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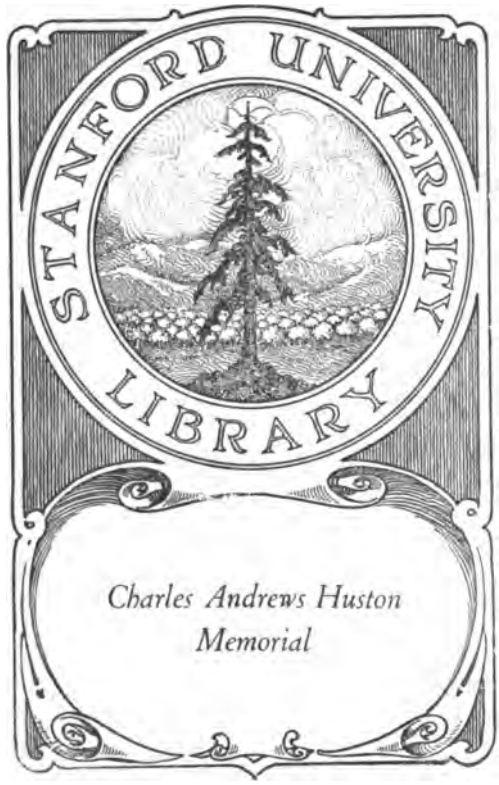
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CASES FOR ANALYSIS.

To accompany this volume.

THE STUDY OF CASES. A Course of Instruction in Reading and Stating Reported Cases, comprising Head-Notes and Briefs, Criticising and Comparing Authorities, and Compiling Digests. By EUGENE WAMBAUGH, LL. D. Second edition, revised and enlarged.

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BY

EUGENE WAMBAUGH, LL.D.,
PROFESSOR OF LAW IN HARVARD UNIVERSITY.

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PREFACE.

THIS volume, consisting wholly of cases, has been prepared as the basis for a course of instruction in the use of the reports. The student is expected to study the cases minutely, to state the facts and the results, to discover *dicta*, to determine the precise doctrine and weight of each decision, to compose head-notes, to compare and criticise the cases, and to compile a digest. The cases have been selected chiefly because of supposed fitness for such a course of study, — a course intended not to teach any one branch of law, but simply to teach by practice the methods and principles adapted to the use of authorities in all branches. Yet an attempt has also been made to present cases that discuss or apply valuable principles of law.

For the purpose of comparing cases with one another, either with the intention of discovering how law changes or with the intention of discovering how decisions supplement one another and eventually develop a rounded doctrine, it is obviously useful to place in juxtaposition cases bearing on identical or related topics. Hence the principal purpose of the volume has permitted, and even

required, the selection of cases developing some topics rather thoroughly. The cases in the text and in the notes deal exclusively with some of the elementary topics in Contracts and in Torts; and consequently the course of study herein provided may be treated, if so desired, as a supplement to courses on those subjects.

Whether used in connection with courses on Contracts and Torts, or as the basis of a wholly independent course on the methods of using authorities, the volume will not accomplish its purpose unless the student analyzes and criticises the cases with the greatest care. The cases cited in the notes should also be compared with one another and with the cases printed in the text. The work thus mapped out may be appropriately enlarged by the addition of other exercises: for example, the student will find it advantageous to seek in the digests and reports of some chosen jurisdiction cases similar to those here reprinted or cited, and to imagine numerous hypothetical cases to which the same principles of law are applicable, and to compose briefs and opinions for real or hypothetical cases.

For the work contemplated by this volume it is almost indispensable that the student have the aid of an instructor, or at least the aid of a fellow-student; for the cases should be discussed from more than one point of view, and the beginner's results should invariably be subjected to criticism. To assist the student who is without instruction and companionship, and who consequently must be his own guide and critic, the notes

contain frequent references to the companion volume entitled "The Study of Cases."

The cases are printed without head-notes, because the composing of head-notes is an important part of the contemplated course of study. In other respects, the cases are reported in full, except when there is a note indicating otherwise. Many of the cases appeared in the first edition of "The Study of Cases;" but none of them appear in the second edition of that volume.

October 31, 1894.

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CASES FOR ANALYSIS.

BOOK I.

A SELECTION OF CASES ON CONTRACTS.

COOKE *v.* OXLEY.

King's Bench, 1790.

[*Reported in* 3 *T. R.* 653.]

THIS was an action upon the case; and the third count in the declaration, upon which the verdict was taken, stated that on, &c., a certain discourse was had, &c., concerning the buying of 266 hogsheads of tobacco; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said 266 hogsheads [at a certain price]; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, *if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day;* the plaintiff averred that he did agree to purchase the same

upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he also averred that he requested the defendant to deliver to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, &c.

A rule having been obtained to show cause why the judgment should not be arrested, on the ground that there was no consideration for the defendant's promise.

Erskine and *Wood* now showed cause. This was a bargain and sale on condition; and though the plaintiff might have rescinded the contract before four o'clock, yet not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not delivering the tobacco, and not for not selling it.

Lord Kenyon, Ch. J. (stopping *Bearcroft*, who was to have argued in support of the rule). Nothing can be clearer than that at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore *nudum pactum*.

Buller, J. It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract was first made. Then as to the subsequent time, the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time.

GROSE, J. The agreement was not binding on the plaintiff before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is therefore no consideration for the promise.

Rule absolute.[1]

BRUCE AND BRUCE *v.* PEARSON.

Supreme Court of New York, 1808.

[*Reported in* 3 *Johns.* 534.]

THIS was an action of *assumpsit*, for goods sold and delivered. The cause was tried at the last sittings in New York, before Mr. Justice Van Ness.

On the 11th December, 1805, the defendant, who resides at Albany, wrote a letter to the plaintiffs, who are merchants in the city of New York, as follows:

"ALBANY, 11th December, 1805.

"GENT., — Should you find it perfectly agreeable to yourselves (not otherwise), you can send me by any sloop, provided you think the river will keep open, the goods I have noted at foot, and payable the 15th May next. If you think the time too long, you need not send them."

The goods mentioned were, "6 hogsheads rum; 1 hogshead sugar; 1 pipe gin; 1 pipe brandy; 4 quarter-chests hyson-skin tea; 20 or 40 small boxes pipes, if low; 10 barrels of codfish."

The plaintiffs, on the 21st December, 1805, shipped on board of a sloop, for the defendant, "3 hogsheads rum; 1 pipe brandy; 2 chests tea; 1 hogshead sugar; and 1 pipe of gin." At the bottom of the bill were these words: "At three months: interest after, till paid."

[1] This judgment was affirmed in the Exchequer Chamber; M. 32 Geo. 3.

See the comments in Anson, Hare, Langdell, Leake, and Pollock on Contracts, and in Benjamin on Sales; and see Wam. St. Cas. §§ 1–3, 11, 21, 42, 44, 58, App. I.–III.

They also wrote to the defendant as follows:

"DEAR SIR, — Your much esteemed favor of the 11th inst. we only received on the 19th. We were much at a loss to know how to act; we, however, have calculated to risk the getting up, and have reduced the order, and shipped per the Fair Play, as on the other side.

The vessel having the goods on board (the river being much obstructed with ice) was, during her passage, cast away, and part of the goods wholly lost. The master, on the 8th January, 1806, having left the vessel, went to Albany, and delivered the letter of the plaintiffs to the defendant, who having read it, said that he did not consider the goods as his, as the plaintiffs had not sent all the goods ordered, nor on the terms proposed. On the same day the defendant wrote to the plaintiffs, informing them that the vessel was ashore, and that he did not consider the goods at his risk, and advising them to give directions for their preservation, offering, if the plaintiffs considered him as liable, to leave the question to be decided by arbitrators.

The goods were charged at the market price of goods, at three months' credit.

The plaintiffs offered to prove, that the defendant had frequently, prior to the 11th December, 1804, sent orders to the plaintiffs for goods, which were executed only in part, and that the defendant had always received the goods sent, without making any objection; and that it was a general usage among merchants in the city of New York, to send to their customers in the country a part only of the goods ordered; but this evidence was objected to, and overruled. The judge was about to order the plaintiffs to be called, when the counsel agreed that a verdict might be taken for the plaintiffs, subject to the opinion of the court on a case containing the facts above stated; and that, if the opinion of the court should be in favor of the defendant, a nonsuit should be entered.

The case was now argued, by *D. B. Ogden* and *Boyd*, for the plaintiffs; and

P. W. Radcliff, and *J. Radcliff*, for the defendant.

PER CURIAM. The order sent by the defendant to the plaintiffs was for 6 hogsheads of rum, and other articles at a credit of six months; and the plaintiffs sent only 3 hogsheads, and omitted part of the other articles, charging those sent, at a credit of three months. This cannot amount to a contract. There is no agreement, no *aggregatio mentium* between the parties, as to the thing, or subject matter of the contract. The defendant wished to have the whole of the goods; a part of them might be of no use; and until he assented to receive a part instead of the whole, he cannot be said to have contracted to pay for a part; and there can be no implied *assumpsit* to pay, as the goods sent never came to his hands.

Judgment of nonsuit.[1]

ADAMS AND OTHERS *v.* LINDSELL AND ANOTHER.

King's Bench, June 5, 1818.

[*Reported in* 1 *B. & Ald.* 681.]

ACTION for non-delivery of wool according to agreement. At the trial at the last Lent Assizes for the county of Worcester, before Burrough, J., it appeared that the defendants, who were dealers in wool at St. Ives, in the county of Huntingdon, had, on Tuesday, the 2d of September, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, Worcestershire: "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be

[1] Compare Champion *v.* Short, 1 Camp. 52 (1807); and Putnam *v.* Grace, 37 N. E. R. 166 (Mass. 1894). See Wam. St. Cas. §§ 41–45.

paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, receiving your answer in course of post."

The letter was misdirected by the defendants to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 P. M. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday, September 8th, the defendants, not having, as they expected, received an answer on Sunday, September 7th (which, in case this letter had not been misdirected, would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances, the learned judge held that, the delay having been occasioned by the neglect of the defendants, the jury must take it that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained; and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter Term obtained a rule *nisi* for a new trial, on the ground that there was no binding contract between the parties,

Dauncey, *Puller*, and *Richardson* showed cause. They contended that, at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis and *Campbell* in support of the rule. They relied on Payne *v.* Cave, and more particularly on Cooke *v.* Oxley. In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time, at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract,

even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, and not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons. But

THE COURT said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post.

Rule discharged.[1]

JOHN B. TREVOR, JR., AND JAMES B. COLGATE, Appellants, *v.* JOHN WOOD, GEORGE W. WOOD, AND JAMES CULLEN, Respondents.

Court of Appeals of New York, 1867.

[*Reported in* 36 *N. Y.* 307.]

APPEAL from a judgment of the Supreme Court rendered at General Term, in the first district, reversing a judgment

[1] See Wam. St. Cas. §§ 11–13, 45, 55–56, 68, 85, 91–92.

entered upon the report of Hon. Wm. Mitchell, referee, and ordering a new trial before the same referee.

The appellants have stipulated that if the judgment be affirmed, judgment absolute may be entered against them.

The appellants are dealers in bullion in New York, and the respondents are dealers in bullion in New Orleans. In 1859 they agreed to deal with each other in the purchase and sale of dollars, and that all communications between them in reference to such transactions should be by telegraph.

On 30th January, 1860, the appellants telegraphed from New York to the respondents, at New Orleans, asking at what price they would sell one hundred thousand Mexican dollars. On the 31st of the same month, the respondents answered that they would deliver fifty thousand at seven and one-quarter; and on the same day the appellants telegraphed from New York to the defendants, at New Orleans, as follows:

"To John Wood & Co. — Your offer fifty thousand Mexicans at seven and one-quarter accepted; send more if you can. TREVOR & COLGATE."

At the same time the appellants sent by mail to the respondents a letter acknowledging the receipt of the respondents' telegram, and copying the appellants' telegraphic answer. On the same day the respondents had also sent by mail a letter to the appellants, copying respondents' telegram of that date. On the next day (1st February, 1860), the appellants again telegraphed to the respondents as follows:

"To John Wood & Co. — Accepted by telegraph yesterday, your offer for fifty thousand Mexicans; send as many more, same price. Reply. TREVOR & COLGATE."

This telegram, as well as that of 31st of January, from the appellants, did not reach the respondents until 10 A. M. on 4th February, 1860, in consequence of some derangement in a part of the line used by the appellants, but

which was not known to the appellants until 4th February, when the telegraph company reported the line down. On 3d February the respondents telegraphed to the appellants as follows: "No answer to our despatch — dollars are sold;" and on the same day they wrote by mail to the same effect. The appellants received this despatch on the same day, and answered it on the same day as follows: "To John Wood & Co. — Your offer was accepted on receipt;" and again the next day: "The dollars must come, or we will hold you responsible. Reply. Trevor & Colgate." And again on 4th February insisting on the dollars being sent "by this or next steamer," and saying "don't fail to send the dollars at any price."

On the same 4th of February the respondents telegraphed to appellants, "No dollars to be had. We may ship by steamer twelfth, as you propose, if we have them." No dollars were sent, and this action was brought to recover damages for an alleged breach of contract in not delivering them. The referee found for the plaintiff $219.33.

George Thompson, for the appellant.

W. Z. Larnee, for the respondent.

SCRUGHAM, J. — The offer of the respondents was made on the 31st of January, and they did not attempt to revoke it until the 3d of February. The offer was accepted by the appellants before, but the respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case, is whether a contract was created by this acceptance before knowledge of it reached the respondents.

The case of Mactier *v.* Frith, in the late Court of Errors (6 Wend. 103), settles this precise question, and was so regarded by this court in Vassar *v.* Camp (1 Kern. 432), where it is said that the principle established in the case of Mactier *v.* Frith was that it was only necessary "that there should be a concurrence of the minds of the parties upon a distinct proposition manifested by an overt act;

and that the sending of a letter announcing a consent to the proposal was a sufficient manifestation and consummated the contract from the time it was sent."

There is nothing in either the case of Mactier *v.* Frith nor in that of Vassar *v.* Camp, indicating that this effect is given to the sending of a letter, because it is sent by mail through the public post-office, and in fact the letter referred to in the first case could not have been so sent, for it was to go from the city of New York to Jacmel, in the island of St. Domingo, between which places there was at that time no communication by mail.

The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, and thus marking that "*aggregatio mentium*" which is necessary to constitute a contract.

Mr. Justice Marcy, in delivering the leading opinion in Mactier *v.* Frith, says: "What shall constitute an acceptance will depend in a great measure upon circumstances. The mere determination of the mind unacted on can never be an acceptance. Where the offer is by letter the usual mode of acceptance is by the sending of a letter announcing a consent to accept; where it is made by a messenger a determination to accept returned through him or sent by another would seem to be all the law requires if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; keeping silence under certain circumstances is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract."

It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to

their transactions by it the same force and validity they would derive if they had been performed through other agencies. In accordance with this agreement the offer was made by telegraph to the appellants in New York, and the acceptance addressed to the respondents in New Orleans, and immediately despatched from New York by order of the appellants. It cannot, therefore, be said that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been used in the transaction by the respondents, and which had been selected by prior agreement between them as that by means of which their business should be transacted.

Under these circumstances the sending of the despatch must be regarded as an acceptance of the respondents' offer, and thereupon the contract became complete.

I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication the parties mutually assume its hazards, which are principally as to the prompt receipt of the despatches.

The referee finds as a fact that the respondents answered the telegram of the appellants asking at what price they would sell 100,000 Mexican dollars by another telegram as follows, viz.:

"Trevor & Colgate, New York. — Will deliver fifty thousand at seven and one-quarter per Moses Taylor. Answer. JOHN WOOD & Co."

It was proved on the trial that this telegram was sent by the respondents; and a letter of the same date, signed by them, repeating the telegram and stating that they had sent it, was read in evidence.

This affords sufficient evidence of subscription by the respondents to take the case out of the Statute of Frauds.

The judgment should be reversed.

All the judges concurring, except BOCKES and GROVER, JJ., who concurred only in the result.

Judgment reversed.[1]

SAMUEL P. WHITE, Respondent, *v.* JOHN W. CORLIES AND JONATHAN N. TIFFT, Appellants.

Court of Appeals of New York, 1871.

[*Reported in* 46 *N. Y.* 467.]

APPEAL from the judgment of the general term of the first judicial district, affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract.

The plaintiff was a builder, with his place of business in Fortieth Street, New York City.

The defendants were merchants at 32 Dey Street.

In September, 1865, the defendants furnished the plaintiff with specifications, for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September twenty-eighth the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants.

On the day following the defendants' book-keeper wrote the plaintiff the following note:

"NEW YORK, September 29th.

"Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

[1] See Wam. St. Cas. § 48.

"The writer will call again, probably between five and six this P. M. W. H. R.,

"For J. W. CORLIES & Co.,

"32 Dey Street."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September twenty-ninth, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey Street (meaning to give notice of assent), before commencing the work?"

"In my opinion it was not. He had a right to act upon this notice and commence the job, and that was a binding contract between the parties."

To this defendants excepted.

L. Henry, for appellants. The manifestation of assent must be such as tends to give notice to proposing party. (Mactier *v.* Frith, 6 Wend. 103; Vassar *v.* Camp, 11 N. Y. 441.)

Mr. Field, for respondent. Not necessary that the fact of concurrence by one party should be made known to the other. (Mactier *v.* Frith, 6 Wend. 103, 117.) An agent acting, apparent authority binds the principal. (Story on Agency, § 443; Clark *v.* Metropolitan Bank, 3 Duer, 241; Mechanics' Bank *v.* N. H. R. Road, 13 N. Y. 599; Farmers' and Mechanics' Bank *v.* B. and D. Bank, 16 N. Y. 125; Dunning *v.* Roberts, 35 Barb. 463; Cornell *v.* Maston, 35 Barb. 157; Witbeck *v.* Schuyler, 44 Barb. 469.)

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement

between the parties, before the written communication of the defendant of September thirtieth was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound in contract to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be, in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which in itself is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act, uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur, but ALLEN, J., not voting.

Judgment reversed and new trial ordered.[1]

THE MINNESOTA LINSEED OIL COMPANY *v.* THE COLLIER WHITE LEAD COMPANY.

Circuit Court of the United States, District of Minnesota, 1876.

[*Reported in* 4 *Dillon*, 431.]

Before NELSON, J.

THIS action was removed from the State court, and trial by jury waived.

The plaintiff seeks to recover the sum of $2,151.50, with interest from September 20, 1875, — a balance claimed to be due for oil sold to the defendant.

[1] Compare Beckwith *v.* Cheever, 21 N. H. 41 (1850); Trounstine *v.* Sellers, 35 Kan. 447 (1886). See Wam. St. Cas. § 101.

The defendant, in its answer, alleges that on August 3, 1875, a contract was entered into between the parties, whereby the plaintiff agreed to sell and deliver to the defendant, at the city of St. Louis, during the month of August, twelve thousand four hundred and fifty (12,450) gallons of linseed oil for the price of fifty-eight (58) cents per gallon, and that the plaintiff neglected and refused to deliver the oil according to the contract; that the market value of oil after August 3d and during the month was not less than seventy (70) cents per gallon, and therefore claims a set-off or counter-claim to plaintiff's cause of action. The reply of the plaintiff denies that any contract was entered into between it and defendant.

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following despatch to the defendant:

"MINNEAPOLIS, July 29, 1875.

"To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri:

"Account of sales not enclosed in yours of 27th. Please wire us best offer for round lot named to you — one hundred barrels shipped.

"MINNESOTA LINSEED OIL COMPANY."

The following answer was received:

"ST. LOUIS, MO., July 30, 1875.

"To the Minnesota Linseed Oil Company:

"Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer.

"COLLIER COMPANY."

The following reply was returned:

"MINNEAPOLIS, July 31, 1875.

"Will accept fifty-eight (58) cents, on terms named in your telegram.

MINNESOTA LINSEED OIL COMPANY."

This despatch was transmitted Saturday, July 31, 1875, at 9.15 P. M., and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between eight and nine o'clock.

On Tuesday, August 3, at 8.53 A. M., the following despatch was deposited for transmission in the telegraph office:

"ST. LOUIS, MO., August 3, 1875.

"To Minnesota Linseed Oil Company, Minneapolis:

"Offer accepted — ship three hundred barrels as soon as possible.

"COLLIER COMPANY."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis:

"MINNEAPOLIS, August 3, 1875.

"To Collier Company, St. Louis:

"We must withdraw our offer wired July 31st.

"MINNESOTA LINSEED OIL COMPANY."

Answered:

"ST. LOUIS, August 3, 1875.

"Minnesota Linseed Oil Company:

"Sale effected before your request to withdraw was received. When will you ship?

"COLLIER COMPANY."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon.

It is urged by the defendant that the despatch of Tuesday, August 3, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of twelve thousand four hundred and fifty gallons of oil.

The plaintiff, on the contrary, claims, 1st, that the despatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

Young & Newel, for the plaintiff.

Geo. L. & Chas. E. Otis, for the defendant.

NELSON, J. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. (See Am. Law Reg. vol. 14, No. 7, 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also, Trevor *v.* Wood, 36 N. Y. 307.)

The reason for this rule is well stated in Adams *v.* Lindsell (1 Barn. & Ald. 681). The negotiation in that case was by post. The Court said "that if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on *ad infinitum.*" (See, also, 5 Pa. St. 339; 11 N. Y. 441; Mactier *v.* Frith, 6 Wend. 103; 48 N. H. 14; 8 English Common Bench, 225.) In

the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8.53 of the clock, on Tuesday morning, August 3d, and the subsequent despatches are out of the case. (1 Parsons on Contracts, 482, 483.)

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the despatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (vol. 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. . . . If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied.

Judgment accordingly.[1]

WINN *v.* BULL.

Chancery Division, before the Master of the Rolls, 1877.

[*Reported in* 2 *Ch. D.* 29.]

On the 16th of March, 1877, the plaintiff and defendant entered into and signed the following agreement for a lease of a freehold house belonging to the plaintiff:

"An agreement entered into between William Winn (the plaintiff) of the one part, and Edward Bull (the defendant) of the other part: whereby the said William Winn agrees

[1] See Wam. St. Cas. §§ 11, 13, 26, 42, 56, 63.

to let and the said Edward Bull agrees to take on lease for the term of seven years from the 9th day of May, 1877, the dwelling-house and premises known as 'Westwood,' situate in the Avenue, Southampton, as the same were lately in the occupation of Mrs. Sullivan, at the yearly rent of £180, the first year's rent to be allowed to the said Edward Bull and to be laid out by him in substantial repairs to the property. This agreement is made subject to the preparation and approval of a formal contract."

No formal or other contract was ever entered into between the parties.

The plaintiff's solicitor subsequently sent the defendant's solicitor a draft of the proposed lease containing covenants on the part of the defendant to keep the premises in repair.

The defendant objecting to take a lease in this form, a correspondence passed between the parties, which resulted in the plaintiff insisting that the lease should remain substantially in its original form, whereas the defendant contended that its terms were contrary to the intention of the agreement, and he ultimately refused to take a lease at all. The plaintiff thereupon brought this action claiming specific performance of the agreement.

In his statement of defence the defendant relied upon the Statute of Frauds, alleging that the agreement was conditional only, and that no final agreement for a lease was ever reduced into writing or signed by him or his agent within the meaning of the statute.

The plaintiff then joined issue, and the action now came on for trial.

Chitty, Q. C., and *Jolliffe*, for the plaintiff, contended that the agreement was sufficiently clear in its terms; that it was equivalent to an agreement for a lease containing "usual covenants," which would include a covenant to repair; and that the final clause meant nothing more than that parties should be bound in a more formal manner. They referred to Rossiter *v.* Miller,[1] Crossley *v.* Maycock,[2] and Chinnock *v.* Marchioness of Ely.[3]

[1] 5 Ch. D. 648. [2] L. R. 18 Eq. 180. [3] 4 D., J. & S. 638.

Roxburgh, Q. C., and *Maidlow*, for the defendant, were not called upon.

JESSEL, M. R. I am of the opinion there is no contract. I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, "We will have the terms put into form," then all the terms being put into writing and agreed to, there is a contract.

If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled.

Now with regard to the construction of letters which are relied upon as constituting a contract, I have always thought that the authorities are too favorable to specific performance. When a man agrees to buy an estate, there are a great many more stipulations wanted than a mere agreement to buy the estate and the amount of purchase-money that is to be paid. What is called an open contract was formerly a most perilous thing, and even now, notwithstanding the provisions of a recent Act of Parliament, — the Vendor and Purchaser Act, 1874, — no prudent man who has an estate to sell would sign a contract of that kind, but would stipulate that certain conditions should be inserted for his protection. When, therefore, you see a stipulation as to a formal agreement put into a contract, you may say it was not put in for nothing, but to protect the vendor against that very thing. Indeed, notwithstanding protective conditions, the vendor has not unfrequently to allow a deduction from the purchase-money to induce the purchaser not to press requisitions which the law allows him to make.

All this shows that contracts for purchase of lands should contain something more than can be found in the short and meagre form of an ordinary letter.

When we come to a contract for a lease, the case is still stronger. When you bargain for a lease simply, it is for an ordinary lease and nothing more, — that is, a lease containing the usual covenants and nothing more; but when the bargain is for a lease which is to be formally prepared, in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, — that is, covenants which are not comprised in or understood by the term "usual covenants." It is then only rational to suppose that when a man says there shall be a formal contract approved for a lease, he means that more shall be put into the lease than the law generally allows. Now, in the present case, the plaintiff says in effect, "I agree to grant you a lease on certain terms, but subject to something else being approved." He does not say, "Nothing more shall be required beyond what I have already mentioned," but "something else is required" which is not expressed. That being so, the agreement is uncertain in its terms, and consequently cannot be sustained.

The distinction between an agreement which is final in its terms, and therefore binding, and an agreement which is dependent upon a stipulation for a formal contract, is pointed out in the authorities.

I will take only one of them, Chinnock *v.* Marchioness of Ely.[1] There Lord Westbury says:[2] "I entirely accept the doctrine . . . that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties." Then he goes on: "But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

[1] 4 D., J. & S. 638. [2] 4 D., J. & S. 645, 646.

That judgment of Lord Westbury's did not require any approval, but it was approved of by the Court of Appeal in Rossiter *v.* Miller.[1]

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail. The result is, that I must hold that there is no binding contract in this case, and there must therefore be judgment for the defendant.[2]

Solicitors: *Lovell, Son, & Pitfield,* agents for *Deacon & Co.,* Southampton; *Stocken & Jupp,* agents for *W. J. H. Bull,* Southampton.

MOULTON *v.* KERSHAW AND ANOTHER.

Supreme Court of Wisconsin, 1884.

[*Reported in* 59 *Wis.* 316.]

APPEAL from the Circuit Court for Milwaukee County.

The case is thus stated by Mr. Justice TAYLOR:

"The complaint alleges that the defendants were dealers in salt in the city of Milwaukee, including salt of the Michigan Salt Association; that the plaintiff was a dealer in salt in the city of La Crosse, and accustomed to buy salt in large quantities, which fact was known to the defendants; that on the 19th day of September, 1882, the defendants, at Milwaukee, wrote and posted to the plaintiff at La Crosse a letter of which the following is a copy:

[1] 3 Ch. Div. 648.

[2] Compare Brown *v.* N. Y. C. R. R. Co., 44 N. Y. 79 (1870). See Wam. St. Cas. §§ 13, n., 63.

"'MILWAUKEE, September 19, 1882.

"'J. H. Moulton, Esq., La Crosse, Wis. — Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of eighty to ninety-five bbls., delivered at your city, at 85c. per bbl., to be shipped per C. & N. W.R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

"'Yours truly, C. J. KERSHAW & SON.'

"The balance of the complaint reads as follows: 'And this plaintiff alleges, upon information and belief, that said defendants did not send said letter and offer by authority of, or as agents of, the Michigan Salt Association, or any other party, but on their own responsibility. And the plaintiff further shows that he received said letter in due course of mail, to wit, on the 20th day of September, 1882, and that he, on that day, accepted the offer in said letter contained, to the amount of two thousand barrels of salt therein named, and immediately, and on said day, sent to said defendants at Milwaukee a message by telegraph, as follows:

"'"LA CROSSE, September 20, 1882.

"'"To C. J. Kershaw & Son, Milwaukee, Wis.: Your letter of yesterday received and noted. You may ship me two thousand (2,000) barrels Michigan fine salt, as offered in your letter. Answer.

"'"J. H. MOULTON."

"'That said telegraphic acceptance and order was duly received by said defendants on the 20th day of Sepember, 1882, aforesaid; that two thousand barrels of said salt was a reasonable quantity for this plaintiff to order in response to said offer, and not in excess of the amount which the defendants, from their knowledge of the business of the plaintiff, might reasonably expect him to order in response thereto.

"'That although said defendants received said acceptance and offer of this plaintiff on said 20th day of September, 1882, they attempted, on the 21st day of September, 1882, to withdraw the offer contained in their said letter of September 19, 1882, and did, on said 21st day of September, 1882, notify this plaintiff of the withdrawal of said offer on their part; that this plaintiff thereupon demanded of the defendants the delivery to him of two thousand barrels of Michigan fine salt, in accordance with the terms of said offer, accepted by this plaintiff as aforesaid, and offered to pay them therefor in accordance with said terms, and this plaintiff was ready to accept said two thousand barrels, and ready to pay therefor in accordance with said terms. Nevertheless, the defendants utterly refused to deliver the same, or any part thereof, by reason whereof this plaintiff sustained damage to the amount of eight hundred dollars.

"'Wherefore the plaintiff demands judgment against the defendants for the sum of eight hundred dollars, with interest from the 21st day of September, 1882, besides the costs of this action.'

"To this complaint the defendants interposed a general demurrer. The Circuit Court overruled the demurrer, and from the order overruling the same the defendants appeal to this court."

Benj. K. Miller, of counsel, for the appellants, cited: 1 Parsons on Con. (1857), 400; 1 Wharton on Con. 43, sec. 18; Anson on Con. (2d Eng. ed.), 15, 23; 1 Addison on Con. (3d Am. ed.), par. 20 *ad fin.*; Beaupre *v.* P. & A. Tel. Co., 21 Minn. 155; Kinghorne *v* Montreal Tel. Co., U. C. 18 Q. B. 60; s. c. Allen's Tel. Cas. 98; Lyman *v.* Robinson, 14 Allen, 264; Ridgway *v.* Wharton, 8 H. L. Cas. 304; Sourwine *v.* Truscott, 17 Hun, 431; Greve *v.* Ganger, 36 Wis. 371.

For the respondent there was a brief by *Jenkins, Winkler, & Smith*, and oral argument by *Mr. Winkler*. They cited: Keller *v.* Ybarru, 3 Cal. 147; Great Northern R'y Co. *v.* Witham, L. R. 9 C. P. 16; Cherry *v.* Smith, 3 Humph.

19; Highlands C. & M. Co. *v.* Mathews, 76 N. Y. 145; Washburn *v.* Fletcher, 42 Wis. 152; Cheney *v.* Cook, 7 id. 143.

TAYLOR, J. The only question presented is whether the appellants' letter, and the telegram sent by the respondent in reply thereto, constitute a contract for the sale of 2,000 barrels of Michigan fine salt by the appellants to the respondent at the price named in such letter.

We are very clear that no contract was perfected by the order telegraphed by the respondent in answer to appellants' letter. The learned counsel for the respondent clearly appreciated the necessity of putting a construction upon the letter which is not apparent on its face, and in their complaint have interpreted the letter to mean that the appellants by said letter made an express offer to sell the respondent, on the terms stated, such reasonable amount of salt as he might order, and as the appellants might reasonably expect him to order, in response thereto. If in order to entitle the plaintiff to recover in this action it is necessary to prove these allegations, then it seems clear to us that the writings between the parties do not show the contract. It is not insisted by the learned counsel for the respondent that any recovery can be had unless a proper construction of the letter and telegram constitute a binding contract between the parties. The alleged contract being for the sale and delivery of personal property of a value exceeding $50, is void by the Statute of Frauds, unless in writing. Sec. 2308, R. S. 1878.

The counsel for the respondent claim that the letter of the appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one carload. On the other hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom

he desired to trade, soliciting their patronage. To give the letter of the appellants the construction claimed for it by the learned counsel for the respondent, would introduce such an element of uncertainty into the contract as would necessarily render its enforcement a matter of difficulty, and in every case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a binding contract between the parties. And this question would not in any way depend upon the language used in the written contract, but upon proofs to be made outside of the writings. As the only communications between the parties, upon which a contract can be predicated, are the letter and the reply of the respondent, we must look to them, and nothing else, in order to determine whether there was a contract in fact. We are not at liberty to help out the written contract, if there be one, by adding by parol evidence additional facts to help out the writing so as to make out a contract not expressed therein. If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent not less than one car-load. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such quantity as the appellants, from their knowledge of the business of the respondent, might reasonably expect him to order.

Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to con-

strue the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the prices named, and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of Justice Foster in the opinion in Lyman *v.* Robinson, 14 Allen, 254: "That care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. If the letter had said to the respondent "we will sell you all the Michigan fine salt you will order, at the price and on the terms named," then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the respondent might have ordered, possibly any amount, or make good their default in damages. The case cited by the counsel decided by the California Supreme Court (Keller *v.* Ybarru, 3 Cal. 147) was an offer of this kind with an additional limitation. The defendant in that case had a crop of growing grapes, and he offered to pick from the vines and deliver to the plaintiff, at defendant's vineyard, so many grapes then growing in said vineyard as the plaintiff should wish to take during the present year at ten cents per pound on delivery. The plaintiff, within the time and before the offer was withdrawn, notified the defendant that he wished to take 1,900 pounds of his grapes on the terms stated. The court held there was a contract to deliver the 1,900 pounds. In this case the fixing of the quantity was left to the person to whom the offer was made, but the amount which the defendant offered, beyond which he could not be bound, was also

fixed by the amount of grapes he might have in his vineyard in that year. The case is quite different in its facts from the case at bar.

The cases cited by the learned counsel for the appellants (Beaupre *v.* P. & A. Tel. Co., 21 Minn. 155, and Kinghorne *v.* Montreal Tel. Co., U. C. 18 Q. B. 60) are nearer in their main facts to the case at bar, and in both it was held there was no contract. We, however, place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "we are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, "we offer to sell to you." They use general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.

By the Court. — The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.[1]

[1] Compare Knight *v.* Cooley, 34 Iowa, 218 (1872); Talbot *v.* Pettigrew, 3 Dak. 141 (1882); Harvey *v.* Facey, [1893] A. C. 552, P. C. See Wam. St. Cas. §§ 18, 25, 56.

BYRNE & CO. *v.* LEON VAN TIENHOVEN & CO.

Common Pleas Division, 1880.

[*Reported in* 5 *C. P. D.* 344.]

ACTION tried at Cardiff assizes, before Lindley, J., without a jury.

B. T. Williams, and *B. Francis Williams*, for the plaintiff.

M'Intyre, Q. C., and *Hughes*, for the defendants.

Cur. adv. vult.

March 6. LINDLEY, J. This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1,000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury; and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be £375.

The defendants carried on business at Cardiff, and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on the 1st of October, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on the 11th and 15th of October respectively. These letters and telegram were as follows: [The learned judge read the letter of the 1st of October, 1879, from the defendants to the plaintiffs. It contained a reference to the price of tinplates branded "Hensol," and the "offer of 1,000 boxes of this brand 14 × 20 at 15s. 6d. per box f. o. b. here with 1 per cent for our commission; terms, four months' bankers' acceptance on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here."

The answer was a telegram from the plaintiffs to the defendants sent on the 11th of October, 1879: "Accept thousand Hensols." On the 15th of October, 1879, the plaintiffs wrote to the defendants: "We have to thank you for your valued letter under date 1st inst., which we had on Saturday P. M., and immediately cabled acceptance of the 1,000 boxes 'Hensol,' 1c. 14 × 20 as offered. Against this transaction we have pleasure in handing you herewith the Canadian Bank of Commerce letter of credit No. 78, October 13th, on Messrs. A. R. McMaster & Brothers, London, £1,000. . . . Will thank you to ship the 1,000 'Hensols' without delay."] These letters and telegram would, if they stood alone, plainly constitute a contract binding on both parties. The defendants in their pleadings say that there was no sufficient writing within the Statute of Frauds, and that they contracted only as agents; but these contentions were very properly abandoned as untenable, and do not require further notice. The defendants, however, raise two other defences to the action which remain to be considered. First, they say that the offer made by their letter on the 1st of October was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to these are as follows: On the 8th of October the defendants wrote and sent by post to plaintiffs a letter withdrawing their offer of the 1st. The material part of this letter was as follows: "Confirming our respects of the 1st inst. we hasten to inform you that there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about twenty-five per cent, we are reluctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1,000 boxes 'Hensols' at 17s. 6d. to be cancelled from this date." This letter of the 8th of October reached the plaintiffs on the 20th of October. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting

on completion of the contract. [The learned judge read the letter. In it the plaintiffs expressed astonishment at the contents of the letter of the 8th, recapitulated the transactions, and said "practically and in fact a contract for 1,000 boxes came into existence between you and ourselves. It requires the consent of both parties to a contract to cancel same. If instead of writing to us on the 8th you had cabled 'offer withdrawn,' you would have protected yourselves and us too. We disposed of the 1,000 boxes on the 17th at a net profit of 1,850 dollars. . . . We write our friend Philip S. Philips, Esq., of Aberkllery, requesting him to call on you and demand delivery as agreed." In a postscript they added, "You speak of offer of 1,000 boxes Hensol at 17s. 6d. The only offer we received from you under date 1st of October was 1,000 boxes at 15s. 6d., and ten per cent f. o. b. Cardiff; we cable you to-night, 'demand shipment.'"] This letter is followed by one from the defendants to the plaintiffs of the 25th of October refusing to complete. [The learned judge read it. The defendants acknowledged the receipt of the cable message of the 20th, enclosed the credit note sent in the letter of the 15th, and added: "Our offer having been withdrawn by our letter of the 8th inst., we now return the above credit, for which we have no further need, but take this opportunity to observe that in case of any future business proposals between us, we must request you to conform to our rules and principles, which require bankers' credit in this country, whereas the firm of A. R. McMaster & Brothers are not classified as such."]

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not: Routledge *v.* Grant.[1] For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the

[1] 4 Bing. 653.

offer has been sent. 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States: see Tayloe *v.* Merchants' Fire Insurance Co.,[1] cited in Benjamin on Sales, pp. 56–58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, ed. ii. p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted: Harris' Case;[2] Dunlop *v.* Higgins,[3] even although it never reaches its destination. When, however, these authorities are looked at, it will be

[1] 9 Howe, 390. [2] Law Rep. 7 Ch. 587. [3] 1 H. L. 381.

seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail, no person who had received an offer by the post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

The defendants' next defence is that, as the plaintiffs never sent a banker's acceptance on London or Liverpool

as stipulated in the contract, they cannot maintain any action for its breach. The correspondence which preceded the contract satisfies me that the defendants attached importance to this particular mode of payment; and although the plaintiffs sent letters of credit which were practically as good as a banker's acceptance, yet I cannot say that they did in fact send a banker's acceptance according to the contract.

By the terms of the contract bankers' acceptances on London or Liverpool were to be sent against — i. e., were to be exchanged for — shipping documents; and if the defendants had been ready and willing to perform the contract on their part on receiving proper bankers' acceptances, I should have been of opinion that the plaintiffs would not have sustained this action. But it is perfectly manifest from the correspondence that the defendants did not refuse to perform the contract on any such ground as this. It is true that the defendants in their letter of the 31st of October, say that "even if we had not withdrawn our offer we would all the same have returned your credit," and the defendants' solicitors in their letter of the 26th of November say that, "if your clients (i. e. the plaintiffs) had fulfilled the terms of the contract at the outset the goods were ready to be shipped," but the defendants' own letters of 8th, 13th, and 25th of October, show conclusively that this was not the case, and that the defendants stood on their notice of withdrawal, and would not have performed the contract even if bankers' acceptances had been sent. Their letter of the 25th of October in which they return the plaintiffs' first letter of credit is explicit on this point. The defendants do not return the letter of credit because it is not a banker's acceptance, but because the offer was withdrawn; and the inference I draw from that letter is that if the offer had not been withdrawn the defendants would not have returned the letter of credit, although in future transactions they might have been more particular. In face of this refusal, it was useless for the plaintiffs to

send a banker's acceptance, and although when they found their first letter of credit returned they sent another which was declined, still the defendants never receded from their first position, or expressed any readiness to ship the goods on receiving a banker's acceptance; and it is plain to my mind that they were not prepared to do so. On the other hand, I am satisfied that if the defendants had taken this ground the plaintiffs would have sent bankers' acceptances in exchange for shipping documents, and I infer as a fact that the plaintiffs always were ready and willing to perform the contract on their part, although they did not in fact tender proper bankers' acceptances. It was contended that by pressing the defendants to perform their contract the plaintiffs treated it as still subsisting, and could not treat the defendants as having broken it, and a passage in Mr. Benjamin's book on Sales, p. 454, was referred to in support of this contention. But when the plaintiffs found that the defendants were inflexible, and would not perform the contract at all, they had, in my opinion, a right to treat it as at an end and to bring an action for its breach. It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. The authorities referred to by Mr. Benjamin (viz., Avery *v.* Bowden[1] and others of that class) show that as the plaintiffs did not, when the defendants first refused to perform the contract, treat that refusal as a breach, the plaintiffs cannot now treat the contract as broken at the time of such refusal. But I have found no authority to show that a continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as a breach of it by the defendants. On the contrary, Ripley *v.* McClure,[2] and Cort *v.* Ambergate, &c. Ry. Co.[3] show that the continued refusal by the defendants operated as a continued waiver of a tender of bankers' acceptances, and enable the plaintiffs to sustain this action.

[1] 5 E. & B. 714. [2] 4 Ex. 345. [3] 17 Q. B. 127.

In the present instance it is not necessary to determine exactly when the contract can be treated by the plaintiffs as broken by the defendants. It is sufficient to say that whilst the plaintiffs were always ready and willing to perform the contract on their part, the defendants wrongfully and persistently refused to perform the contract on their part; and before action there was a breach by the defendants not waived by the plaintiffs. For the reasons above stated I give judgment for the plaintiffs for £375 and costs.

Judgment for plaintiffs.[1]

Solicitors for plaintiffs: *Robinson, Preston & Stow,* for *Colborne & Ward,* Newport, Monmouthshire.

Solicitors for defendants: *Ingledew & Ince,* for *Ingledew, Ince, & Vachell,* Cardiff.

HELEN C. LEWIS *v.* MATTHEW P. BROWNING.

Supreme Judicial Court of Massachusetts, 1881.

[*Reported in* 130 *Mass.* 173.]

LORD *and* SOULE, JJ., *absent.*

CONTRACT for breach of the covenants of a written lease of a tenement in Boston. Trial in the Superior Court, without a jury, before Rockwell, J., who allowed a bill of exceptions in substance as follows:

The defendant admitted that there had been a breach of the conditions of the lease, and agreed that judgment might be entered for the plaintiff in the sum of $2,168.22, unless the facts herein stated constituted a defence to this action.

The judge found that the defendant, who was a resident of New York in the year 1878, was, during the summer of that year, temporarily residing and practising his pro-

[1] Compare Dickinson *v.* Dodds, 2 Ch. Div. 463 (1876); and Coleman *v.* Applegarth, 68 Md. 21 (1887).

fession as a physician at Cape May, in the State of New Jersey, and that the plaintiff and her husband, Dr. Dio Lewis, residents of Boston at that time, were temporarily residing at Oakland, in the State of California; that, on June 10, 1878, Lewis, who was and still is the authorized agent of his wife, the plaintiff, wrote the defendant a letter, which was received by him, in which he requested the defendant to make him an offer for a new lease of said premises. The defendant replied, making such offer, by letter dated June 22, 1878. In this letter the defendant gave, as a reason for desiring to make the new contract, his anxiety to be released from all claim by the plaintiff.

On July 8, 1878, Lewis wrote the defendant a letter, which he received on July 17, 1878, at Cape May, in which Lewis accepted the defendant's offer, with slight modifications, and which contained the following: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware. Telegraph me 'yes' or 'no.' If 'no,' I will go at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.'"

The defendant, on said July 17, went to the telegraph office of the Western Union Telegraph Company in Cape May, wrote a telegraphic despatch directed to Dio Lewis, Oakland, Cal., delivered it to the telegraphic agent and operator of said company, and paid the full price for its transmission to Oakland, and gave directions to have it forwarded at once. The defendant did not keep a copy of the telegram. He gave notice to the plaintiff to produce the telegram, and testified that he had exhausted all the means in his power in Boston, New York, and New Jersey, in his endeavors to produce the telegram; that he had been to the Cape May office of the company, and had learned that the operator to whom he gave his despatch was not in charge of that office; that he had made diligent search for him without being able to learn his whereabouts; and that

in this search he had had the aid of the superintendent and other officers of the company in Boston. He also offered to prove, by an officer of the company in Boston, that both by rule and custom of the company, so far as he knew the custom, the despatches received and sent from all the offices of the company were destroyed after they had been in the possession of the company six months. If, under these circumstances, it was competent to prove the contents of said despatch by oral testimony, the judge found that the word telegraphed was "yes."

The judge also found that Lewis never received said telegram; that the new lease to be made, as stipulated in the letters of Lewis and the defendant, was to be like the former lease in form, with the various modifications and changes contained in said letters, and was to be delivered in Boston, and the consideration then paid; and that the Mr. Ware mentioned in Lewis's letter was the plaintiff's attorney, residing in Boston.

The defendant contended that a contract was completed by said letters and telegram on July 17, under the law of the State of New Jersey; and that this case was controlled by the law of New Jersey. The judge found that the law of New Jersey is as stated in Hallock *v.* Commercial Ins. Co., 2 Dutcher, 268; ruled, as matter of law, that the facts as above set forth did not show a new contract, and constituted no defence to this action; and found for the plaintiff in the sum agreed upon. The defendant alleged exceptions.

O. T. Gray, for the defendant.

D. E. Ware, for the plaintiff, was not called upon.

GRAY, C. J. In Mulloch *v.* Eagle Ins. Co. 1 Pick. 278, this court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in Langdell

on Contracts (2d ed.), 989–996. In England, New York, and New Jersey, and in the Supreme Court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post-office duly addressed. Adams *v.* Lindsell, 1 B. & Ald. 681; Dunlop *v.* Higgins, 1 H. L. Cas. 381, 398–400; Newcomb *v.* De Roos, 2 E. & E. 271; Harris's Case, L. R. 7 Ch. 587; Lord Blackburn in Brogden *v.* Metropolitan Railway, 2 App. Cas. 666, 691, 692; Household Ins. Co. *v.* Grant, 4 Ex. D. 216; Lindley, J., in Byrne *v.* Van Tienhoven, 4 C. P. D. 344, 348; 2 Kent Com. 477, note c.; Mactier *v.* Frith, 6 Wend. 103; Vassar *v.* Camp, 1 Kernan, 441; Trevor *v.* Wood, 36 N. Y. 307; Hallock *v.* Commercial Ins. Co., 2 Dutcher, 268, and 3 Dutcher, 645; Tayloe *v.* Merchants' Ins. Co., 9 How. 390.

But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. Thesiger, L. J., in Household Ins. Co. *v.* Grant, 4 Ex. D. 223; Pollock on Con. (2d ed.) 17; Leake on Con. 39, note. And in the case at bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware," the plaintiff's attorney in Boston. "Telegraph me 'yes' or 'no.' If 'no,' I will go at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.'" Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before the

20th of July, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a despatch at the telegraph office had the same effect as the mailing of a letter, he has no ground of exception to the ruling at the trial.

Exceptions overruled.

WILLIAM H. PERRY *v.* THE MOUNT HOPE IRON COMPANY.

Supreme Court of Rhode Island, 1886.

[*Reported in* 15 *R. I.* 380.]

EXCEPTIONS to the Court of Common Pleas.

July 24, 1886. DURFEE, C. J. This is an action to recover damages of the defendant corporation for refusing to receive a cargo of "bolt and nut scrap and boiler-plate" iron, so called, which the plaintiff claims the defendant agreed to buy at the rate of 87½ cents per hundred, delivered at its works in Somerset, Massachusetts. Upon trial in this Court of Common Pleas, the jury found a verdict for the plaintiff. The case is before us on the defendant's petition for a new trial for alleged misrulings, and on the ground that the verdict was against the evidence and the weight thereof. The plaintiff lives and does business in Providence. The defendant is a Massachusetts corporation, having its business establishment in Somerset, Massachusetts. Job M. Leonard is treasurer, and has an office in Boston. He makes purchases for the defendant. On the trial in the court below, the plaintiff put in testimony to show that his agent visited Leonard April 30, 1885, and informed him that the plaintiff had the "nut and bolt shop scrap," and solicited an offer for it; that Leonard offered 87½ cents per hundred, delivered at the company's

wharf, and the agent asked him to let the offer stand until the next day, which Leonard agreed to do; and that the next day the plaintiff telegraphed from Providence to Leonard in Boston, accepting the offer. The defendant did not admit that the offer was made as stated, and made the point that, if it was so made, the contract was not completed by the acceptance until the acceptance reached him in Boston, and that consequently the alleged contract was a Massachusetts contract, and, not being in writing, was invalid under the Massachusetts Statute of Frauds, which was put in proof. The court below ruled the point against the defendant, holding that the contract was completed in Rhode Island by sending the telegram. The defendant cites a few cases which support its position. McCulloch *v.* Eagle Insurance Co., 1 Pick. 278; British and American Telegraph Co. *v.* Colson, L. R. 6 Exch. 108; Langdell's Cases on Contracts, §§ 1–18; Langdell's Summary of Contracts, §§ 14–16. But the weight of authority strongly supports the instruction given by the court. 1 Addison on Contracts, *18, note 1, and cases there cited; Maclay *v.* Harvey, 32 Amer. Rep. note on p. 40. This note contains a full report of the recent English case, Household Fire and Carriage Accident Insurance Co. *v.* Grant, L. R. 4 Exch. Div. 216. The case was decided in the Court of Appeal July 1, 1879, by Thesiger and Bagallay, L. JJ., Bramwell, L. J., dissenting. Its doctrine is, that the contract is binding on the proposer as soon as a letter accepting the proposal, properly directed to him, is posted by the recipient, whether it reaches the proposer or not, if posted without unreasonable delay, and the post is the ordinary and natural mode of transmitting the acceptance. In that case the letter did not reach the proposer, and Bramwell, L. J., who dissented, conceded that, "where a posted letter arrives, the contract is complete on posting." In the case at bar the arrival of the telegram is not disputed. We are of opinion that the contract, if made, was completed in Rhode Island, and is a Rhode Island contract,

notwithstanding it was to be performed in Massachusetts. Hunt *v.* Jones, 12 R. I. 265. If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that, if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified, is immaterial.

The other alleged misrulings were on the admission of evidence. Evidence was admitted to show that the plaintiff paid 80 cents per hundred for the "nut and bolt shop scrap" when he bought it. We think the evidence was irrelevant. The issue did not turn upon any question of price. The second alleged misruling was a refusal to admit testimony offered by the defendant to show that the scrap tendered by the plaintiff was not the kind of scrap which was adapted for use at the defendant's works. We think the testimony should have been admitted, for reasons which will be clearer after we have considered the second ground for a new trial.

The second ground is that the verdict was against the evidence and the weight thereof. The defendant denies ever making any offer as stated by the plaintiff. The offer, if made, was made to the plaintiff's agent, no one being present but the plaintiff's agent and Leonard. The agent testified as follows: "Saw Mr. Leonard in his office, and offered him some nut and bolt shop scrap. He asked me what I asked for it. I told him I wanted him to make me an offer, and he said he would give 85 cents a hundred for it. I told him that was too low, but that I could deliver it to his wharf by vessel, I thought. I asked him if he thought he could not give me any more. He said he could give me 87½ cents if I could deliver it at his wharf in Somerset, Massachusetts. I asked him to let the offer stand until the next day. He said he would do so." Leonard testified that he had conversation only about "No. 1 iron," which was the kind used at the Somerset works; that he told the plaintiff's agent that he must have it

guaranteed No. 1, or must inspect it himself; that the agent agreed to leave the matter open and give him an opportunity to see it, and that the iron tendered was not No. 1 iron. We think the testimony very clearly shows that it was not No. 1. The defendant adduced several dealers who testified that it was the custom to buy inferior scrap by inspection only, because some has more and some less skeleton or light iron, and it varies in value. Their testimony, taken in connection with the samples exhibited, seems to us very cogent. The plaintiff's agent alone testifies to the contrary of this. We do not think it probable, in view of this testimony, that Leonard would have made this offer at a venture, without seeing the scrap or a sample of it. The burden of proof is on the plaintiff. We incline to think that the verdict is against the weight of the evidence as the evidence stands. But this state of the proof makes apparent the value of the testimony ruled out; for it is improbable that Leonard would run the risk of buying, without inspection, scrap which was not adapted to use by the defendant, and therefore the testimony, if admitted, might have been all that was necessary to lead the jury to render a verdict for the defendant.

Exceptions sustained.[1]

Lemuel H. Foster, for plaintiff.

Augustus S. Miller & Arthur L. Brown, for defendant.

THE ROYAL INS. CO. *v.* WILLIAM BEATTY.

Supreme Court of Pennsylvania, 1888.

[*Reported in* 119 *Pa.* 6.]

Error to the Court of Common Pleas, No. 2, of Philadelphia County.

BEFORE GORDON, C. J., PAXSON, STERRETT, GREEN, CLARK, and WILLIAMS, JJ.; TRUNKEY, J., absent.

No. 407 January Term 1887, Sup. Ct.; No. 667 March Term 1886, C. P. No. 2.

[1] Compare Henthorn *v.* Fraser, [1892] 2 Ch. 27, C. A.

An action of covenant, afterward changed to assumpsit, was brought (when, not shown), by William Beatty against the Royal Insurance Company of Liverpool, to recover upon two policies of insurance, each for $3,000 and for the term of one year expiring at the same time on January 6, 1886.

At the trial on June 11, 1887, the evidence, more fully appearing in the opinion of this court, was to the effect that on the day before the term of the policies expired, the clerk of an insurance broker who had charge of them was sent to the defendant company's office to "bind" them, that is, to have it agreed upon that they should be deemed in force till it was ascertained whether there would be a change in the rates, and then the insured would determine whether to drop the policies or renew them. The clerk had a memorandum of other policies for other people with him, to which it was desired that the night clause — the privilege of running at night — be extended, and asked the renewal clerk of the insurance company to "bind" the policies in suit and to have the night clause extended to the others. The insurance clerk discussed with the broker's clerk the subject of the night clause in the other policies, but said nothing and did nothing with reference to "binding" the policies in suit. The broker's clerk assumed or believed he had assented and so reported to his own office, where memoranda were made upon the broker's books indicating that the policies were renewed. The loss occurred on January 10th, following. The defendant company's renewal clerk testified that he did not hear the request to "bind" the policies in suit, and the policies had not been renewed.

At the close of the testimony, the defendant requested the court to charge the jury:

1. That there was no evidence of an acceptance by the defendant of the offer to renew the plaintiff's policies, and the verdict of the jury must be for the defendant.

The court, HARE, P. J., refused to affirm this point, and

submitted the cause upon the evidence, the charge not appearing upon the paper books.

The verdict of the jury was for the plaintiff, amount not shown, and, judgment being entered thereon, the defendant took this writ, assigning as error, *inter alia*, the refusal to affirm the point submitted by the defendant.

Mr. R. C. McMurtrie, for the plaintiff in error:

1. If the facts, as stated by the witnesses, entitled a jury to infer that an assent was given, or that the plaintiff's agent was entitled to assume an assent, the judgment must be affirmed. It may even be conceded that if the defendant heard the request and said nothing, he may be within the rule relied on by the court. But what is the rule? It applies only where there is a duty to speak, and silence misleads. It is impossible to assert that if I do not hear and understand, I am compelled to speak on the pain of being concluded. Hearing and understanding are presupposed in the maxim.

2. The plaintiff did not pretend to assert that the defendant heard him. He implies, of course, that he supposed he had; but when the denial came it was necessary to do something more than rely on the presumption that a remark had been heard. It was quite clear on the defendant's side that his agent had done nothing and said nothing to make a contract. He had told his master there was none made; that he had not been asked to make it, and his master had acted on this.

3. Was there any evidence that warranted the inference that this was mistaken or false? No one asserted that he had heard, or that the speaking was such that he must have heard. And after the denial and proof corroborative that defendant had acted on the footing that there was no contract, there was no attempt to give any fact that could justify the assumption of the unproved and denied fact that a request to renew or bind was heard and known to have been made.

4. Then, the case being that the plaintiff must affirma-

tively establish the making of the contract, and there being nothing more than a statement of a request not followed by any act or by any assertion that the request was so made as to be certainly heard, in judging between the two the court seemed to suppose it was a mere question of which was to be believed, not seeing that if both spoke the truth, which was at least possible, the plaintiff had certainly failed to prove his case.

Mr. George H. Earle, Jr. (with him *Mr. Richard P. White*), for the defendant in error:

1. It was established beyond controversy that it was the settled custom of the defendant company in cases where a policy was about to expire, to continue it upon notification that the insured wanted it "bound." The broker's clerk testified positively that he had the policy so continued; the insurance clerk admitted all the facts stated by the witness, except that the particular policies in suit were named. The sole question, therefore, was the simple one, whether it was the broker's clerk, or the insurance clerk, who gave the correct testimony as to what took place.

2. As it is conceded that, if the policies in suit were mentioned so as to be heard, according to the custom a verbal assent was not necessary, it seems unnecessary to quote authorities to show that the circumstances as testified to warranted the jury in finding a contract. In Clisman *v.* Count, 2 M. & Gr. 307, several items were submitted, and, as in the present case, a part only were mentioned and objected to; held, that there was evidence of a binding contract as to the balance. Admission by silence also, as well as admission by speech, may have a contractual force, and may bind as effectually as may words. When such silent admissions so operate to put the actor in a specific attitude to other persons, by which such other persons are induced to do, or omit to do, a particular thing, then he is estopped from subsequently denying that he occupied such position, and is compelled to make good any

losses which such other parties may have sustained by his course in this relation: Whar. Con., § 6.

OPINION, MR. JUSTICE GREEN:

We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence, which contributed to the establishment of the relation.

But in any point of view it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there was no duty of speech there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred and had not been formally renewed. At the time of the fire, the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound

them. Q. State what was said and done. A. I went into the office of the Royal Company, and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The Court: Whom were the policies for? A. For Mr. Beatty. The Court: That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the policies at that time. The Court: What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Q. Did you say anything about those policies (Robert Beatty's) at that time? A. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is, that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly if not entirely for the jury. But here the utterance was a question and not an assertion, and there was no answer to the question.

Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how then can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court and not for the jury; for if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding or in doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether the defendant would bind or renew the policies and obtained no answer, what was his duty? Undoubtedly to repeat his question until he obtained an answer. For his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of an agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him, and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly it was his duty to speak again, and to take further action if he really intended to obtain the defendant's assent. For what he wanted was something affirmative and positive, and without it he has no status.

But he desists, and does and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract.

The other facts proved and offered to be proved, but rejected improperly, as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if the defendant heard plaintiff's request and made no answer, an inference of assent should be made. For the hearing of a request and not answering it is as consistent, indeed more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was, of course, no duty of speech.

Judgment reversed.

RANN AND ANOTHER, *Executors of* MARY HUGHES, *v.* ISABELLA HUGHES, *Administratrix of* J. HUGHES.

House of Lords, 1778.

[*Reported in* 7 *T. R.* 346, *note* (*a*).]

THE declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiffs' testator £983; that

the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of £983 was unpaid, "by reason of which premises the defendant, as administratrix, became liable to pay to the plaintiffs, as executors, the said sum; and being so liable, she, in consideration thereof, undertook and promised to pay, &c." The defendant pleaded *non assumpsit, plene administravit,* and *plene administravit* except as to certain goods, &c., which were not sufficient to pay an outstanding bond-debt of the intestate's therein set forth, &c. The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant *de bonis propriis.* This judgment was reversed in the Exchequer Chamber; and a writ of error was afterwards brought in the House of Lords, where, after argument,[1] the following question was proposed to the judges by the Lord Chancellor: "Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity;" upon which the Lord Chief Baron Skynner delivered the opinion of the judges to this effect: It is undoubtedly true that every man is, by the law of nature, bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum ex quo non oritur actio;* and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant, being indebted as administratrix, promised to pay when requested; and the

[1] The arguments of counsel are found in 4 Bro. P. C. (Tomlins' ed.) 27, and in Langdell's Cases on Contracts (2d ed.), 189, note 1.

judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise; but the promise must be coextensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing; and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His Lordship observed upon the doctrine of *nudum pactum* delivered by Mr. J. Wilmot in the case of Pillans *v.* Van Mierop and Hopkins, 3 Burr. 1663, that he contradicted himself, and was also contradicted by Vinnius in his comment on Justinian.

All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that

the Statute of Frauds has taken away the necessity of any consideration in this case; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law; and does not prove the converse of the proposition, that when in writing the party must be at all events liable. He here observed upon the case of Pillans *v.* Van Mierop, in Burr., and the case of Losh *v.* Williamson, Mich. 16 G. 3, in B. R.; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.[1]

BARTLETT *v.* WYMAN.

Supreme Court of New York, 1817.

[*Reported in* 14 *Johns.* 260.]

IN ERROR, on *certiorari*, to the Justices' Court of the city of New York.

This was an action of *assumpsit* for seaman's wages.

[1] See Wam. St. Cas. §§ 17, 45, 55, 58, 60.

The defendant in error, who was plaintiff in the court below, in the month of November, 1813, shipped in the port of New York, on board the letter of marque brig Regent, commanded by the plaintiff in error, who was defendant below, and signed shipping articles in common form, for a voyage from New York to Charleston or Savannah, from thence to France, and back to the United States, at seventeen dollars per month. Three witnesses on the part of the plaintiff below who were seamen on board of the brig, testified, that some time after the brig had been in Savannah, the defendant below came forward to the crew, and observed to them that if they would be faithful to the voyage, he would give them thirty dollars per month, or the highest wages out of the port, and that this was his own offer, and that there had been no difference or dispute between him and his crew; that several days after the promise to increase their wages, some of the people, among whom was the plaintiff below, met the defendant near the gangway, and asked him whether he meant to draw and execute new articles, to which he replied they must content themselves, that he would do what was right. That some time after this, the ship's company being ashore, the defendant came to them, and observed that he had promised to raise their wages, and the highest wages out of port were beyond all reason; but considering that they were bound at seventeen dollars, he thought he would be doing well by them, if he increased their wages to thirty dollars, observing, at the same time, that he did not know whether his owners would approve it, but if they did not he would pay it out of his own pocket. The plaintiff's witness further testified, that about the 22d of December the defendant below called all hands into the cabin to sign new articles, and observed that he would perform his promise, and give them thirty dollars. That the articles were prepared and read to the crew by one Hunter, and were for the continuance of the voyage to France, as in the first articles, and were dated, as was

believed, on the first of December, at which time their wages were to commence at thirty dollars. That the new articles were signed by the plaintiff below, and all the rest of the crew, but not by the captain; and shortly after the brig dropped down to the light-house, to avoid the effect, as the defendant said, of an embargo which he understood was likely to be laid by Congress. On the new articles being produced, there appeared an indorsement upon them, which had been made without the knowledge of the crew, as follows: "Georgia, Savannah. The seamen having demanded an increase of wages, and being apprehensive that they might desert if this was not done, these articles were drawn up as a mere matter of form; it is, however, understood that the articles signed in New York are to bind, and those signed here to be of no avail, 25th December, 1813. A. Hunter, Public Notary." The plaintiff below proceeded with the brig to France, and returned to New York in about six months.

On the part of the defendant, it appeared in evidence, that the brig was ready for sea about the 25th or 26th of December, 1813; that in the interval between her arrival and the making the promise for the increase of wages, there was a rumor at Savannah that an embargo was about to be laid by Congress, which occasioned a rise in seaman's wages, and many sailors in the port of Savannah left their vessels and went on board of others; that, at this time, the crew came after the captain to demand new articles, and an increase of wages, saying that they would not go the voyage unless their wages were increased; that the defendant asked them if they thought it just, but ultimately entered into new articles, at an increased rate of wages. The jury found a verdict for the plaintiff below, the defendant in error, for his wages according to the new articles, deducting money advanced, and his proportion of goods embezzled on board the brig.

The return of the *certiorari* was submitted to the court without argument.

SPENCER, J., delivered the opinion of the court. The court are of the opinion that the judgment of the court below is erroneous, and that the defendant below was not bound by the new articles entered into at Beaufort, for several reasons:

1. As being in contravention of the policy of the Act of Congress of the 20th of July, 1790 (Vol. I. 134). The statute requires, under a penalty, every master of a ship or vessel bound from a port in the United States, to any foreign port, before he proceeds on the voyage, to make an agreement, in writing or print, with every seaman, or mariner, on board, with the exception of apprentices, or servants, declaring the voyage, and term of time for which the seaman, or mariner, shall be shipped. In the present case this was done, and the rate of wages fixed at seventeen dollars per month, for the whole voyage. To allow the seamen at an intermediate port to exact higher wages, under the threat of deserting the ship, and to sanction this exaction by holding the contract, thus extorted, binding on the master of the ship, would be not only against the plain intention of the statute, but would be holding out encouragement to a violation of duty as well as of contract. The statute protects the mariner, and guards his rights in all essential points; and to put the master at the mercy of the crew takes away all reciprocity.

2. It is very clear that the owners are not bound by the master's contract; because he had no power to make it. They were already bound by the shipping articles, and the obligation was mutual. He had no authority to give more than the sum for which they had originally stipulated to perform the voyage. If so, then the exaction of higher wages may be considered as an undue advantage taken of the master's situation.

3. The promise to give higher wages is void for the want of consideration. The seamen had no right to abandon the ship at Beaufort; and a promise to pay them an extra price for abstaining from doing an illegal act was a *nudum pactum*.

4. The written agreement, at the port of departure, is the only legitimate evidence of the contract, and a mariner can recover nothing not specified in the shipping articles, where those articles have been entered into. (1 Comyn on Contracts, 369; 5 Esp. Rep. 85; Peake's *Nisi Prius*, 72; 2 Bos. & Pul. 116.)

5. In the present instance, the master never intended to be bound, for he never executed the new agreement.

On these grounds, the court cannot hesitate in saying the judgment below must be reversed.

Judgment reversed.[1]

JOHN L. FINK *v.* COX, EXECUTOR OF A. FINK.

Supreme Court of New York, 1820.

[*Reported in* 18 *Johns.* 145.]

THIS was an action of *assumpsit* brought to recover the amount of a promissory note, given by the testator, Alexander Fink, to his son, the plaintiff. The note, which was proved by the subscribing witness, was as follows: "New York, 30th July, 1816. Sixty days after date, I promise to pay John L. Fink, or order, one thousand dollars, value received. Alexander his + mark Fink." The testator, at the time he gave the note to the plaintiff, declared that he gave it to him absolutely, and observed that the plaintiff was not so wealthy as his brother; and that the plaintiff and his brother had had a controversy about a stall, &c., which were the reasons for his giving the note to the plaintiff. There was no actual consideration for the note; and the witness understood it to be a gift from the testator to his son.

The defendant gave in evidence the will of the testator, by which he devised all his personal estate to his sons,

[1] See Wam. St. Cas. §§ 25-26, 56, 63, 101.

including the plaintiff, in equal proportions; and after a devise to his daughter of a house and lot, the residue of his real estate was given to his executors in trust, to sell the same, and divide the proceeds equally among his children. The defendant also gave in evidence the plaintiff's answer to a bill in chancery for a discovery, filed by the executor, in which he stated that the note was freely given to him by the testator, and was founded on the consideration of natural love and affection.

The cause was tried at the New York sittings, in June, 1818, when a verdict was found for the plaintiff, for $1,129 and 30 cents, subject to the opinion of the court, on a case containing the above facts.

Van Wyck, for the plaintiff. 1. This was an absolute gift from the testator to the plaintiff, not merely of a written paper, but of the value in money, or the fruits and effects of the note acknowledging the value received. A *chose in action* is the subject of a valid gift. (Atk. 214.) The plaintiff might have negotiated the note for the amount, which the defendant would have been obliged to pay. The plaintiff had a property in the note, and might have brought trover for it. (2 P. Wms. 204; 1 P. W. 441; 2 Leo. 111; Cro. Eliz. 159; 2 Str. 955; 2 Caines, 246, per Livingston, J.; 3 Caines's Rep. 279; Chitty on Bills, 90; 2 Vesey, jun., 111, 120, 122; 22 Viner Abr. 193, pl. 3.) In Grangiac *v.* Arden (10 Johns. Rep. 293), where a father gave to his daughter a lottery ticket, which drew a prize, and the father afterwards said he had given that ticket to his daughter, and the prize money was hers, it was held sufficient to support an action of *assumpsit* by the daughter against her father for the amount of the prize money which he had received.

2. Blood or natural affection, among near relations, is a good consideration; and is sufficient to support a contract against all persons, except creditors and *bona fide* purchasers. (2 Bl. Com. 444; Plowden, 305.)

Slosson, contra. 1. No doubt, the note, or slip of paper

on which the testator's promise was written, was given to the plaintiff; and to that extent it was a gift. But the object intended was money, not paper; and it is essential to a valid gift that the identical thing intended to be given should be actually delivered. In Grangiac *v.* Arden, the lottery ticket was the means of obtaining the prize money from third persons. So, if the testator had delivered to the plaintiff the note of a stranger, it would have been a valid gift, for it was transferring the power to obtain the money. But here was a gift merely of a written promise to pay money at a future day. In Noble *v.* Smith, 2 Johns. Rep. 52, this court held that an actual and immediate delivery of the thing was essential to a valid gift; for it is not consummate and perfect until a delivery of the thing promised; and until then the party may revoke his promise. (7 Johns. Rep. 26.)

2. In Pearson *v.* Pearson, 7 Johns. Rep. 26, and Schoonmaker *v.* Roosa, 17 Johns. Rep. 301, it was decided that, as between the original parties to a promissory note, the consideration might be inquired into, and if there is no consideration for the promise, it is a *nudum pactum*, and cannot be enforced at law. Suppose the plaintiff had sued his father, in his lifetime, on this note, could he have maintained the action, on the consideration of natural love and affection? Suppose a parol promise by a father to his son, before witnesses, to give him a sum of money, can *assumpsit* be supported on such a promise? (Rann *v.* Hughes, 7 Term Rep. 350, n.) In Tate *v.* Hilbert, 2 Vesey, jun., 111, which was the case of a gift of a check on a banker, and a promissory note; the question was, whether it was to be considered as a *donatio causa mortis;* and the chancellor, who held it not to be a gift of that description, doubted whether an action at law would lie against the executor, on the note, for want of consideration; and, if not, there could be no relief in equity. (Thorn *v.* Deas, 4 Johns. Rep. 84.)

T. A. Emmet. This was not a *donatio causa mortis*,

though intended to be so; and if the action cannot be supported on the note, the testator's intention will be defeated. By giving a note payable to order, he meant that his son should have full power to convert it into money, by negotiating it. If a moral obligation will support an express promise, why should not natural love and affection support such a promise? Why is a moral obligation a sufficient consideration to support an express promise? It is not money or value. It is, because it is just and right that such a promise should be supported. Again; a consideration beneficial to one, or injurious to the other, is sufficient. Blackstone (2 Bl. Com. 444) says, the satisfaction arising from natural affection is equivalent to a benefit. The distinction between a good and a valuable consideration has grown out of the Statute of Uses and the Statute of Frauds. Independent of those statutes, there is no ground for any such distinction. A good as well as a valuable consideration prevents the contract from becoming a *nudum pactum*, which is a contract without any consideration whatever. Plowden says, that "a consideration proceeding from nature is a sufficient consideration in our law;" and a contract founded upon such a consideration cannot be a *nudum pactum*. Why is natural affection a sufficient consideration to support a covenant to stand seised to uses? It is because that, before the Statute of Uses, it would have been sufficient to raise an use. If blood or natural affection is sufficient consideration to raise an use, in regard to land, because it is not a *donum gratuitum*, why is it not sufficient to support a promise to pay money?

SPENCER, Ch. J., delivered the opinion of the court. The question in this case is, whether there is a sufficient consideration for the note on which this suit is founded. It appears from the declaration of the testator when the note was given, that he intended it as an absolute gift to his son, the plaintiff; alleging that the plaintiff was not so

wealthy as his brothers, that he had met with losses, and that he and his brothers had had a controversy about a stall. Such were the reasons assigned for his giving the note to the plaintiff.

There can be no doubt that a consideration is necessary to uphold the promise, and that it is competent for the defendant to show that there was no consideration. (17 Johns. Rep. 301; Schoonmaker *v.* Roosa and De Witt.) The only consideration pretended, is that of natural love and affection from a father to a child; and if that is a sufficient consideration, the plaintiff is entitled to recover, otherwise not.

It is conceded that the gift, in this case, is not a *donatio causa mortis*, and cannot be supported on that ground. In Pearson *v.* Pearson, 7 Johns. Rep. 26, the question was, whether the gift of a note signed by the defendant to the plaintiff was such a vested gift, though without consideration, as to be valid in law; we held that it was not, and that a parol promise to pay money, as a gift, was no more a ground of action, than a promise to deliver a chattel as a gift; and we referred to the case of Noble *v.* Smith, 2 Johns. Rep. 52, where the question underwent a full discussion and consideration. The case of Grangiac *v.* Arden, 10 Johns. Rep. 293, was decided on the principle that the gift of the ticket had been completed by delivery of possession, and is in perfect accordance with the former cases.

It has been strongly insisted that the note in the present case, although intended as a gift, can be enforced on the consideration of blood. It is, undoubtedly, a fair presumption that the testator's inducement to give the note sprang from parental regard. The consideration of blood, or natural love and affection, is sufficient in a deed, against all persons but creditors and *bona fide* purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love

and affection, has been held sufficient. In such a case the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss, or prejudice of the promisee. The note here manifested a mere intention to give the one thousand dollars. It was executory, and the promisor had a *locus pœnitentiæ*. It was an engagement to give, and not a gift. None of the cases cited by the plaintiff's counsel maintain the position that, because a parent from love and natural affection engages to give his son money or a chattel, such a promise can be enforced at law.

Judgment for the defendant.[1]

DANIEL MILLS *v.* SETH WYMAN.

Supreme Judicial Court of Massachusetts, October Term, 1825.

[*Reported in* 3 *Pick.* 207.]

THIS was an action of *assumpsit* brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about 25 years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which

[1] Compare Priester *v.* Priester, Richardson's Eq. Cas. (S. Car.) 26 (1831); and Harris *v.* Clark, 3 N. Y. 93 (1849).

subsisted between Levi Wyman and the defendant; and Howe, J., before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

F. Davis and *Allen* in support of the exceptions. The moral obligation of a parent to support his child is a sufficient consideration for an express promise. Andover, &c. Turnpike Corp. *v.* Gould, 6 Mass. R. 40; Andover *v.* Salem, 3 Mass. R. 438; Davenport *v.* Mason, 15 Mass. R. 94; 1 Bl. Comm. 446; Reeve's Dom. Rel. 283. The arbitrary rule of law, fixing the age of twenty-one years for the period of emancipation, does not interfere with this moral obligation, in case a child of full age shall be unable to support himself. Our Statute of 1793, c. 59, requiring the kindred of a poor person to support him, proceeds upon the ground of a moral obligation.

But if there was no moral obligation on the part of the defendant, it is sufficient that his promise was in writing, and was made deliberately, with a knowledge of all the circumstances. A man has a right to give away his property. [PARKER, C. J. There is a distinction between giving and promising.] The case of Bowers *v.* Hurd, 10 Mass. R. 427, does not take that distinction. [PARKER, C. J. That case has been doubted.] Neither does the case of Packard *v.* Richardson, 17 Mass. R. 122; and in this last case (p. 130) the want of consideration is treated as a technical objection.

Brigham, for the defendant, furnished in vacation a written argument, in which he cited Fowler *v.* Shearer, 7 Mass. R. 22; Rann *v.* Hughes, 7 T. R. 350, note; Jones *v.* Ashburnham, 4 East, 463; Pearson *v.* Pearson, 7 Johns. R. 26; Schoonmaker *v.* Roosa, 17 Johns. R. 301; the note to Wendall *v.* Adney, 3 Bos. & Pul. 249; Fink *v.* Cox, 18 Johns. R. 145; Barnes *v.* Hedley, 2 Taunt. 184; Lee *v.* Muggeridge, 5 Taunt. 36. He said the case of Bowers *v.* Hurd was upon a promissory note, where the receipt of

value is acknowledged; which is a privileged contract. Livington *v.* Hastie, 2 Caines's R. 246; Bishop *v.* Young, 2 Bos. & Pul. 79, 80; Pillans *v.* Mierop, 3 Burr. 1670; 1 Wms. Saund. 211, note 2.

The opinion of the court was read, as drawn up by

PARKER, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound *in foro conscientiæ* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule can-

not be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo;* and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation, which before existed in natural law, but which has been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made

happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from actual want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the Statute of Limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value; though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited, in its application, to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pul. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the

part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this Commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.[1]

PRICE *v.* EASTON.

King's Bench, Hilary Term, 1833.

[*Reported in* 4 *B. & Ad.* 433.]

DECLARATION stated that one William Price was indebted to the plaintiff in the sum of £13, being the balance of a larger sum due for the price of a certain timber carriage sold and delivered to him; and that the defendant, in consideration thereof, and in consideration that the said William Price, at the request of the defendant, had undertaken and faithfully promised the defendant to work for

[1] Compare Patton's Executor *v.* Hassinger, 69 Pa. 311 (1871). See Wam. St. Cas. §§ 17–19, 42–44, 53, 56, 58, 66.

him, the defendant, at certain wages agreed upon between them, and in consideration of William Price leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the sum of £13. Averment that William Price did work for the defendant, and earned a large sum of money, and left the same in his, defendant's, hands. Breach, non-payment to the plaintiff of £13. Plea, *non assumpsit*. The plaintiff having obtained a verdict, a rule *nisi* was obtained by *Campbell* for arresting the judgment, on the ground that the plaintiff was a mere stranger to the consideration; and he cited Bourne *v.* Mason, 1 Vent. 6, and Crow *v.* Rogers, 1 Str. 592; and distinguished the case from Dutton *v.* Poole, 2 Lev. 210, where tenant in fee-simple being about to cut down timber for his daughter's portion, the defendant, his heir at law, in consideration of his forbearing so to do, promised to pay a sum of money to the daughter, and the action by the husband of the daughter was held to be well brought; but there, it was said, there was privity by blood, and the daughter was prejudiced by loss of her portion.

Justice now showed cause. After verdict, it will be intended that everything necessary to support the action was proved. An act from which the defendant receives a benefit, and from which inconvenience arises to the plaintiff, is a sufficient consideration to support an *assumpsit*. Here there was an advantage to the defendant, for he had the benefit of the labor of William Price, and was not bound to pay for it until the 31st of March. Starkey *v.* Mylne, 1 Roll. Abr. 32, pl. 13; Disborne *v.* Denabie, 1 Roll. Abr. 31, pl. 5, and Wilson *v.* Coupland, 5 B. & A. 228, show that where there is a privity between the three parties, *assumpsit* is maintainable without an immediate consideration from the plaintiff to the defendant. In Dutton *v.* Poole, 2 Lev. 310, and Curtis *v.* Collingwood, 1 Ventr. 287, there was no such consideration proceeding immediately from the plaintiff to the defendant.

[PATTESON, J. No promise to the plaintiff is alleged; but merely a promise to pay the plaintiff.]

Campbell, Solicitor-General, (and *Talfourd* was with him,) *contra*, was stopped by the court.

DENMAN, C. J. I think the declaration cannot be supported, as it does not show any consideration for the promise moving from the plaintiff to the defendant.

LITTLEDALE, J. No privity is shown between the plaintiff and defendant. This case is precisely like Crow *v.* Rogers, 1 Str. 592, and must be governed by it.

TAUNTON, J. It is consistent with all the matter alleged in the declaration, that the plaintiff may have been entirely ignorant of the arrangement between William Price and the defendant.

PATTESON, J. After verdict, the court can only intend that all matters were proved which were requisite to support the allegations in the declaration, or what is necessarily to be implied from them. Now, it is quite clear that the allegations in this declaration are not sufficient to show a right of action in the plaintiff. There is no promise to the plaintiff alleged. The rule for arresting the judgment must be made absolute.

Rule absolute.[1]

BAINBRIDGE *v.* FIRMSTONE.

Queen's Bench, Michaelmas Term, 1838.

[*Reported in* 8 *A. & E.* 743.]

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit, &c., in consideration that plaintiff, at the

[1] Compare Lawrence *v.* Fox, 20 N. Y. 268 (1859); Burton *v.* Larkin, 36 Kan. 246 (1887); Wright *v.* Terry, 23 Fla. 160 (1887); Keller *v.* Ashford, 133 U. S. 610 (1890); Chambers *v.* Baldwin, 91 Ky. 121 (1891), s. c. *infra*; Curtin *v.* Somerset, 140 Pa. 70 (1891). Cases are collected in 2 Southern Reporter, 10; 24 Central L. J. 111; and 24 Am. L. Rev. 866. See Wam. St. Cas. § 48.

request of defendant, had then consented to allow defendant to weigh divers, to wit two, boilers of the plaintiff, of great value, &c., defendant promised that he would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect and complete a condition, and as fit for use by plaintiff, as the same were in at the time of the consent so given by plaintiff; and that, although in pursuance of the consent so given, defendant, to wit, on &c., did weigh the same boilers, yet defendant did not nor would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect, &c., but wholly neglected and refused so to do, although a reasonable time for that purpose had elapsed before the commencement of this suit; and on the contrary thereof, defendant afterwards, to wit, on, &c., took the said boilers to pieces, and did not put the same together again, but left the same in a detached and divided condition, and in many different pieces, whereby plaintiff hath been put to great trouble, &c. Plea *non assumpsit*.

On the trial before Lord DENMAN, C. J., at the London sittings after last Trinity term, a verdict was found for the plaintiff.

John Bayley now moved in arrest of judgment. The declaration shows no consideration. There should have been either detriment to the plaintiff, or benefit to the defendant; 1 Selwyn's N. P. 45, 9th ed. It does not appear that the defendant was to receive any remuneration. Besides, the word "weigh" is ambiguous.

LORD DENMAN, C. J. It seems to me that the declaration is well enough. The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave.

PATTESON, J. The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.

WILLIAMS and COLERIDGE, JJ., concurred.

Rule refused.

McKINLEY *v.* WATKINS.

Supreme Court of Illinois, 1851.

[*Reported in* 13 *Ill.* 140.]

Error to LOGAN.

THIS action was commenced by Watkins against McKinley before a justice of the peace. Watkins failed to recover on the trial before the justice, and took an appeal to the Circuit Court. At the April term, 1851, of the Logan Circuit Court, the cause was tried before Davis, Justice, and a jury, and resulted in a verdict and judgment for Watkins, and McKinley brought the cause to this court by writ of error.

Watkins and McKinley had traded horses in 1845; afterwards they had some dispute about the trade, and Watkins threatened to sue unless McKinley would give him a horse, or the worth of the horse which McKinley had got from Watkins, the horse which Watkins had received in exchange having died. McKinley promised that, if Watkins would not sue, he would give him fifty dollars, or a horse worth that sum. Upon this promise Watkins brought his action against McKinley.

W. H. Herndon, for plaintiff in error.

In order to maintain an action for damages sustained in the exchange of property, or in an action to recover back the money paid, or to plead the want of consideration,

there must be a warranty, fraud, or false representations. 1 Scam. 22; 4 Gilm. 73; 2 Kent, 485; 3 Adol. & Ellis, N. S. 234.

Every promise must be founded upon a good or a valuable consideration. A gratuitous promise is not good. 2 Kent, 463, 465; Story on Contracts, 429, 453; Chitty on Contracts, 29.

A moral consideration, if it had not its foundation in a legal consideration, is not sufficient to support the promise. 24 Wend, 97; Story on Contracts, § 465; 19 Pick. 429; 3 Pick. 83.

In the case now under consideration, there was neither fraud, warranty, nor false representation, nor was the promise a legal nor even a moral one, and therefore no action can be maintained. 8 N. H. 154; 52 Eng. Com. Law R. 563; Smith on Contracts, 86, 87; 6 Monroe, 660; 11 S. & Marsh, 431; 3 Adol. & Ellis, N. S. 234; 1 Story on Contracts, § 436; 5 Barb. 550; 19 Pick. 387 to 429; 8 Blackf. 415; 52 Eng. Com. Law, 548; 2 Barb. 420; Story on Contracts, § 436.

T. L. Harris, for defendant in error.

The proof is positive that Watkins claimed $50 because McKinley had put an unsound horse upon him. McKinley never objected that the claim was unjust. He promised to pay if Watkins would not sue him for damages. This suit was upon the promise. The consideration of the promise was "forbearance to sue." This is a good consideration. Rippon *v.* Norton, Cro. Eliz. 881; Matun *v.* West, Cro. Eliz. 665; Lamaster *v.* Buckhurt, 2 Bibb, 448; Bank of Musking *v.* Carpenter's Ad'mrs, Wright, 729, 660; Sidnell *v.* Evans, 1 Penn. 383.

Even the compromise of a doubtful right has always been held a good consideration for a promise. Chitty on Contracts, 35; 6 Munf. 406; 14 Conn. 12; s. c. 2 Rand. 442; 5 Watts, 259; 7 Ad. & El. 19; 1 Williams' Saund. 210 n.; 5 Barn. & Ald. 117; 8 Taunt. 354; Logan *v.* Matthews, 6 Barr, 420; Perkins *v.* Gray, 3 Serg. & Rawle,

331; McCoy *v.* Hutchinson, 8 Watts & Serg. 66; Cavode *v.* McKelvey, Add. 56; Oheson *v.* Barclay, 2 Pa. R. 531; Brown *v.* Sloan, 6 Watts, 423; Union Bank *v.* Geary, 5 Pet. 99.

The promise is distinctly proved. If the defendant relied on his never being or having been liable on the original trade, he should have distinctly proved it. The reasons for this are many; as the death of witnesses to the original trade or contract, or their removal. Lapse of time might bar. The authorities on this point are clear. Slack *v.* Moss, 1 Dud. (Geo.) Rep.; Gould *v.* Armstrong, 2 Hall, 269; and digest of same case, 1 Met. & Per. 101.

But there are cases to show that proof of the non-liability in the original action cannot be intended [introduced]. Taylor *v.* Patrick, 1 Bibb, 168; Osmond *v.* Fitzroy, 3 P. Wms. 130, 131, and n. (a); Mills' Heirs *v.* Lee, 6 Monroe, 97; Barlow *v.* Ocean Ins. Co., 4 Met. 270.

The court will not grant a new trial when substantial justice has been done. Greenup *v.* Stoker, 3 Gilm. 202; Lee *v.* Hughes, 3 Scam. 18; Gillett, et al. *v.* Sweat, et al. 1 Gilm. 490; and other cases.

TRUMBULL, J. This was an action originally commenced before a justice of the peace, and taken by appeal to the Circuit Court, where the plaintiff had judgment for fifty dollars and costs.

The evidence showed that the parties had traded horses; that, a month or two after the trade, the horse which plaintiff got, died, and that he was unsound when the trade took place. There was no evidence of any false representations, or warranty on the part of the defendant in making the trade. After the death of the horse the plaintiff informed the defendant of the fact, and alleged that he was diseased at the time of the trade, whereupon the defendant promised to pay the plaintiff fifty dollars, or let him have a fifty-dollar horse, if he would not sue.

This action was brought to recover the fifty dollars. On the trial, the Circuit Court instructed the jury as follows:

"If the jury believe from the evidence that there was a horse-trade between Watkins and McKinley, out of which a difficulty had grown, and that Watkins was threatening to sue McKinley, and not deceiving him by any misrepresentations, and that McKinley, rather than be sued, promised Watkins that he would pay him fifty dollars, then said promise is binding; and this regardless of the question as to whether McKinley would or would not have been liable in the suit which Watkins was threatening to bring against him."

The only question in the case is as to the propriety of this instruction, and in one point of view it is clearly erroneous. It assumes that the defendant would be bound by his promise, whether assented to by the plaintiff or not. Unless the plaintiff were bound on his part not to do the act which formed the consideration of the promise of the defendant, the agreement was void for want of mutuality. The promise of defendant to pay fifty dollars if plaintiff would not sue him was incomplete till accepted by the plaintiff. Chitty on Contracts, 13.

A mere offer, not assented to, constitutes no contract; for there must be not only a proposal, but an acceptance thereof. Story on Contracts, §§ 377, 378.

The instruction in other respects is very nearly, if not quite, correct. It assumes that, in order to support the promise, there must have been a horse-trade between the parties, out of which a difficulty had arisen, and that the plaintiff was threatening to sue the defendant, and not deceiving him by any misrepresentations. If by this is to be understood that the plaintiff must in good faith have supposed that he had good cause of action against the defendant, growing out of the horse-trade, the instruction is strictly proper. It is immaterial whether the plaintiff could have recovered in such action or not. If he honestly

supposed that he had a good cause of action, the compromise of such right was a sufficient consideration to uphold a contract fairly entered into between the parties, irrespective of the question as to who was in the right. It has often been decided that the compromise of a doubtful right is a sufficient consideration for a promise; and it is immaterial on whose side the right ultimately turns out to be, as it must always be on one side or the other, because there can be but one good right to the same thing. Taylor *v.* Patrick, 1 Bibb, 168; Russell *v.* Cook, 3 Hill, 504; Moore *v.* Fitzwater, 2 Rand. 442; O'Keson *v.* Barclay, 2 Penn. Rep. 531.

If the plaintiff was threatening to sue on a claim which he knew was wholly unfounded, and which he was setting up as a mere pretence to extort money from the defendant, a contract founded on a promise not to sue in such a case would be utterly void. In order to support the promise there must be such a claim as to lay a reasonable ground for the defendant's making the promise, and then it is immaterial on which side the right may ultimately prove to be. Edwards *v.* Baugh, 11 Mees. & Wels. Rep. 641; Perkins *v.* Gay, 3 Serg. & Rawle, 331.

The judgment of the Circuit Court is reversed, and the cause remanded.

Judgment reversed.[1]

TREAT, C. J., dissented.

L'AMOREUX *v.* GOULD.

Court of Appeals of New York, 1852.

[*Reported in* 7 N. Y. 349.]

THE defendant in this action was an endorser upon five promissory notes made by J. W. amounting in the aggregate to $1,140. Two of them amounting to $490, had become payable before May 26, 1841, and the remaining

[1] See Wam. St. Cas. §§ 11, 25, 56.

three were payable after that day. The defendant held as trustee, a judgment against Woodward given to secure certain creditors, and among them the plaintiff as endorser of the notes. Upon that day an agreement in writing was entered into between the defendant and plaintiff, of which the following is a copy:

"James L'Amoreux, Esq., being an endorser on several notes drawn by J. W., some of which have become due, and on some of them prosecutions have been commenced, and the subscriber having a judgment rendered in his favor against the said J. W. entered in the Supreme Court for securing certain creditors agreeably to a certain declaration of trust in writing in which the endorsers on the defendant's paper are included in the first class of creditors, and in which it is declared that such creditors shall be first paid: Now in consideration of the premises and in consideration that the said James L'Amoreux shall advance and pay the sum of one thousand dollars towards satisfying, or in part satisfying, the notes on which he is holden as endorser as aforesaid, and shall exhibit to the said Charles D. Gould the evidence of such payment; the said Charles hereby agrees with the said James, that within one year from this date he will cause to be raised under the said judgment given as aforesaid the said sum of one thousand dollars with interest, and will pay the same over to the said James in satisfaction of the money so to be advanced toward satisfying said endorsements.

"CHARLES D. GOULD.

"Dated August 26, 1841."

The plaintiff subsequently paid the five notes and exhibited them to the defendant, at the same time telling him that he did it in compliance with the agreement, and the defendant replied that it was all right. The defendant refusing to comply with the terms of the agreement, an action of *assumpsit* was brought thereon in September, 1842. The cause was tried by a referee, who found for the

plaintiff the amount due by the terms of the agreement, upon which a judgment was entered in November, 1848. The defendant appealed therefrom.

J. C. Spencer, for appellant.

N. Hill, Jr., for respondent.

EDMONDS, J. (After disposing of some objections arising upon the pleadings which were cured by the finding by the referee),

The only question to be determined, therefore, is whether there was such a want of mutuality between the parties that there was in fact no cause of action.

The proposition is stated by Chitty as broadly as the defendant's counsel claims it, that if the one party never was bound on his part to do the fact which forms the consideration for the promise of the other, the agreement is void for want of mutuality (Chitty Contra. 15); but the proposition is too broadly stated. It is confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise (Arnold *v.* Mayor of Poole, 4 Man. & Gr. 860). For there are many valid contracts not mutually binding at the time when made; as where A says to B, if you will furnish goods to C, I will pay for them, B is not bound to furnish them, but if he does he may recover on the promise (2 Saund. 137, h; Matoon *v.* Burr, 7 Ad. & E. 19; Kenndevay *v.* Treleavan, 5 M. & W. 498). And the question in this case is whether, if he did pay it, the defendant was without any valid or available consideration for his promise. The agreement is, that if the plaintiff will pay $1,000 on notes on which he is holden as endorser, &c. Now I am not very clear whether this means on notes on which he was absolutely fixed and liable as endorser by means of due protest, or those on which he was merely liable to be, in case of non-payment by the drawer. The pleadings do not help us out of the difficulty at all, but the evidence shows that three of the five notes were not due at the time

the agreement was due, and the agreement recites that he was endorser on several notes, some of which had become due, &c. Those notes which had become due at that time, and on which alone the plaintiff could then have become "holden" by due protest, did not amount to one half of the $1,000 that he was to pay, while all of the five notes which he had endorsed amounted to more than the $1,000. I should infer that the parties meant by this equivocal expression to refer to the fact of his endorsement only, and not to the fact of his being fixed as endorser. This is a material consideration, because, if the plaintiff was to pay the $1,000 merely upon notes upon which he was finally fixed and "holden" by due protest, he would do nothing more by paying that sum than merely discharge an obligation which he was bound to perform, and that would form no consideration for the defendant's promise.

But if on the other hand he voluntarily paid the money, without reference to his being fixed as endorser, and in fact waived the various acts of demand and protest which were necessary to fix him as endorser, he thus assumed a liability and performed an act detrimental to himself, which would furnish a good consideration for the promise. And inferring as I do, from the facts proved on the trial and from the language of the agreement, that the parties meant all the notes, as well those not due as those due and protested, I have no difficulty in finding a sufficient consideration to support the promise, in the fact of the plaintiff's having paid the $1,000, and thus enlarged his liability beyond what it was when the agreement was made.

This disposes of the only point not cured by the finding, and I am of opinion the judgment ought to be affirmed.

All the judges concurred in the opinion.

Judgment affirmed.

GOWARD AND ANOTHER *v.* WATERS.

Supreme Judicial Court of Massachusetts, 1868.

[Reported in 98 Mass. 596.]

CONTRACT for one hundred and thirty-five dollars, alleged to be due on a written promise of the defendant concerning the sale of real estate in North Chelmsford; with a count in *quantum meruit.*

In the Superior Court these facts were agreed: On October 6, 1866, the defendant signed the following writing: "I, Samuel A. Waters, of Chelmsford, in consideration that Zephaniah and Francis Goward [the plaintiffs], both of Lowell, shall purchase or shall procure a purchaser for a certain piece of land with the buildings thereon, situated in North Chelmsford, at the price of $4,500, at which sum I value said premises, hereby agree that I will give to said Zephaniah and Francis Goward, or to such purchaser as they shall procure for said premises at said price, a good and sufficient deed of said premises, and I further agree that I will pay to said Zephaniah and Francis Goward all such money exceeding the said stipulated price of said premises as such purchaser procured by them shall pay me for said premises. And, in case I myself sell said premises at said price of $4,500, or at a greater or less price, then I further agree to pay said Zephaniah and Francis Goward three per cent of such price paid to me for said premises."

The real estate referred to was a farm, of which, at that time, the fee was in the defendant and his wife; but the condition of the title was not made known to the plaintiffs, who believed that it was in the defendant alone.

The plaintiffs, by advertising and other means customary in the business of land brokers, tried to procure a purchaser, but had not succeeded, nor had offered to buy it themselves, nor had the defendant given them any deed of

it, when, on December 7th, the defendant and his wife, without the plaintiffs' knowledge, and without knowledge by the purchaser of any agreement between the plaintiffs and the defendant, "made a bargain with Samuel T. Wright to sell to him said piece of land at a sum called $4,500, and take their pay, in cash, $3,300, and another parcel of land, called $1,200; and said Waters and his wife accordingly conveyed said piece of land to said Wright in fee."

On these facts Brigham, J., ruled that the plaintiffs could recover on the count in *quantum meruit*, but not on the count upon the agreement; and both parties appealed.

T. Wentworth & G. Stevens, for the plaintiffs.

D. S. Richardson, for the defendant.

WELLS, J. The bargain and conveyance of the farm by the defendant and his wife was a sale, within the meaning of the contract in suit. The condition of the title cannot affect the right of the plaintiffs nor the liability of the defendant. His contract is merely personal, and is absolute in its terms. By the terms of the last clause of the agreement, Waters was bound to pay the plaintiffs three per cent upon the price for which the farm was sold, which would amount to a hundred and thiry-five dollars. The only defence to a recovery of that sum is, that there appears to be no consideration for the promise.

The position of the defendant's counsel is undoubtedly true, that at the time the contract was signed, it was a mere *nudum pactum*. The plaintiffs paid nothing, incurred no expense or loss, and entered into no obligation on their part. They were at liberty to act or not, as they pleased; and would incur no liability by failing to do anything. But it is also apparent that the writing contemplated services to be rendered and expenses to be incurred by the plaintiffs for the defendant; and that the promises were made in view of such future services and expenses. The writing is merely a stipulation, by the defendant, of the

terms upon which compensation shall be made by him. Subsequent performance of services and expenditure of money, in prosecution of the employment thus authorized, furnish a sufficient consideration for the promises of the defendant. Train *v.* Gold, 5 Pick. 380; Gardner *v.* Webber, 17 Pick. 407. The case finds such a consideration in fact.

After the plaintiffs had entered upon this employment the defendant could not sell without making the stipulated compensation. If they failed to purchase or find a purchaser within a reasonable time after being called upon to fulfil, he might terminate the agreement. But this had not been done. The plaintiffs are therefore entitled to the price agreed for upon the event of a sale by the defendant himself.

The principal difficulty in the case arises from the mention of a consideration in the writing itself. Can a different consideration be shown to support the contract, without violating the rules of evidence relating to contracts in writing? It might, indeed, be questioned whether the term "in consideration" was not used to define the conditions upon which the first branch of the agreement should take effect, rather than to set forth its consideration in a legal sense. But whether it be the one or the other, the term has no application to the last branch of the agreement. It is obvious that this last clause could never be supported by it as a consideration. The very contingency upon which this clause was to become operative involves a defeat of that which is denominated the consideration in the first clause. Under the recital of the agreement, no legal consideration could be furnished, in accordance with its express terms, except by procuring a purchaser for the property. But there is a clear implication of another consideration; to wit, the services in that behalf to be rendered by the plaintiffs. The last clause is intended solely to fix the compensation for such services, in case a sale by the defendant should deprive them of the opportunity to

secure compensation under the provisions of the first clause. Considerations are often found by implications merely. Tingley *v.* Cutler, 7 Conn. 291; Cummings *v.* Dennett, 26 Maine, 397.

Proof of the facts which make out such a consideration does not contradict, add to, nor vary the written contract; but tends to support it according to its legitimate and proper interpretation. The allowance of such proof seems to accord with the decisions in Wallis *v.* Wallis, 4 Mass. 135; Gale *v.* Coburn, 18 Pick. 397; Brewer *v.* Hardy, 22 Pick. 376; Bullard *v.* Briggs, 7 Pick. 533; Hinde's Lessee *v.* Longworth, 11 Wheat. 199; Powell *v.* Monson & Brimfield Manufacturing Co., 3 Mason, 347, 359; McCrea *v.* Purmort, 16 Wend. 471; Belden *v.* Seymour, 8 Conn. 304; Morse *v.* Shattuck, 4 N. H. 229; 2 Phil. Ev. (4th Am. ed.) 655.

The parties having expressly stipulated for the payment of three per cent as the compensation, in the event which has occurred, there can be no recovery upon the *quantum meruit*. But, the court being satisfied that a consideration is shown for the express stipulation, consistently with the terms of the written instrument, the plaintiffs are entitled to judgment for one hundred and thirty-five dollars and interest.

HANDRAHAN *v.* O'REGAN.

Supreme Court of Iowa, 1876.

[*Reported in* 45 *Iowa*, 298.]

Appeal from Dubuque District Court.

ACTION upon a written agreement to recover $120 for rent of forty acres of land. The defendant for answer admits the execution of the agreement, but avers that to the forty acres of land there was no communication from the main road, whereby said land could be reached and

cultivated without trespassing upon the premises of others; that subsequent to the execution of said agreement the plaintiff was informed by this defendant that there was no road or passage over which communication could be had to said land, and plaintiff promised and agreed verbally to procure a road from the main road to said land, but the defendant avers no road ever was procured for, or allowed to, said premises; by reason whereof he was damaged in the sum of $150, for which he asks judgment. The court found that there was due the defendant $80, as damages for failure to procure the road, and rendered judgment for plaintiff for $40. The plaintiff appeals.

H. B. Fouke, for appellant.

E. McCeney and *Fred O'Donnell*, for appellee.

ADAMS, J. There is no averment that the plaintiff owned land adjoining the leased land. There was, therefore, no right of way by necessity. Indeed, the defendant relies solely upon the subsequent agreement. The plaintiff denies such agreement, but the court below found that it was made, and as the evidence is conflicting, except as to consideration, the finding of the court below cannot be disturbed unless it appears that the agreement was without consideration.

On this point the appellee's counsel say: "1st. The promisor was benefited by such agreement, because it would put the promisee in the way to pay rent, which he could not do without the road; 2d. The promisee was not only troubled and inconvenienced by the promise in putting in his crops, which he could have done if he had not been promised a road, but he was also greatly damaged by the agreement, because relying upon it he proceeded to cultivate the place, having to steal in when opportunity afforded, and was thus too late in planting; while if no such agreement had been made, he might have procured (if bound to do so) a right to pass over other land immediately adjoining, and thereby gotten his crop planted in proper season."

To our mind, if such were the facts, no consideration would appear therefrom. If a person should buy a tract of land to which there is no road, and take a conveyance leaving a part or all of the purchase money unpaid, and afterward the grantor, believing that he could procure a road for the grantee, should promise to do so, but should fail to fulfil his promise, would it be a sufficient consideration to support the promise that with the road the grantee would have been able to pay for the land, and was not able without it? No one would claim that it would. Yet we can see no difference in principle between a sale and lease of land, so far as this question is concerned. There are doubtless many things which, if a landlord were to furnish his tenant, would facilitate him in paying his rent, if he was otherwise unable to do so. But such fact would not be a sufficient consideration to support a promise to furnish them.

We proceed now to consider the second ground. Briefly stated, it seems to be this: The defendant relied upon plaintiff's promise, and omitted to procure a road for himself as he otherwise might have done, and was thereby delayed, and failed to get in his crop in season. Now it is true that a disadvantage accruing to the promisee may constitute a consideration for a promise, but to have that effect it must appear that the disadvantage was suffered at the request of the promisor, expressed or implied. There is no evidence of such fact in this case.

It is contended by the defendant that the plaintiff defrauded him by leasing to him land to which there was apparently a road, there being some marks of travel. If the plaintiff induced the defendant to enter into the lease by fraud, the defendant could in a court of equity have procured its cancellation. Again, if after the fraud was discovered he had agreed to waive the fraud, and did waive it by reason of the plaintiff's promise to procure him a road, such waiver would constitute a consideration for the promise. But the evidence shows clearly that nothing was

said between plaintiff and defendant in regard to a road until after the lease was executed. There was then no fraud on the part of the plaintiff. Whoever buys or takes a lease of land must inquire and ascertain for himself in regard to the means of access. If access is yet to be procured, the value of the premises is supposed to be estimated accordingly. Neither a purchaser nor a lessee would be justified in assuming that there is an established road to the premises because there may be marks of travel. If a grantor or lessor makes no representations upon the subject, he will not be guilty of a fraud. His silence will not be fraudulent. There having been no fraud in this case, there was no waiver of fraud, and no consideration by reason thereof.

We are of the opinion that the judgment of the District Court must be

Reversed.

THE CHICAGO AND GREAT EASTERN RAILWAY COMPANY, Appellant, *v.* FRANCIS B. DANE AND OTHERS, Respondents.

Court of Appeals of New York, 1870.

[*Reported in* 43 *N. Y.* 240.]

THIS is an appeal from a judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment for the defendant entered upon the report of a referee.

This action was brought to recover damages on an alleged contract of the defendant to carry and transport a quantity of railroad iron from New York to Chicago for the plaintiffs. The only evidence of the contract was the letters quoted in the opinion of the court. The defendant insisted that the agreement was invalid for want of the proper U. S. internal revenue stamp affixed at the time it was made. But the referee overruled the objection, holding

that it was sufficient under section 173 of the Revenue Act of June 30, 1864, to stamp the instrument on its production in court. This point was not passed on in this court.

Titus and *Westervelt*, for the appellant, insisted that the contract was binding. (Barton *v.* McLean, 5 Hill, 256; Hadden *v.* Dimmick, 31 How. Pr. R. 196; 24 W. 289; 43 B. 35; 1 Metc. 84; 17 B. 260.) As to subsequent offer of plaintiffs they cited 7 N. Y. 350; 5 Pick. 384; 5 M. & W. 501; 8 Pick. 393; 36 B. 583; 46 B. 239; 8 W. 483; 3 Hill, 215. As to necessity of stamp they cited 12 Wheat U. S. 460; 4 B. & C. 49; 8 East, 242; 2 B. & A. 797; 3 Taunt. 220; 11 M. & W. 561; 20 Verm. R. 59; 2 Dowl. 494; 8 Bing. 146; 11 Ex. R. 190; 8 East, 242; 2 Man. & Ryl. 382; 13 Jur. R. § 212; 35 B. 599; 15 N. Y. 85, 152, 153, 254.

H. W. Johnson, for the respondents, that the contract was invalid, cited 1 Pars. on Con. 373–4; 5 Bing. 34; 12 B. 502; 2 B. & C. 474; 9 A. & E. 693; 47 B. 172; 23 W. R. 435; 4 Hill, 351; 12 J. R. 190; id. 397; 1 Caines, 583; 25 E. L. & E. 478.

GROVER, J. Whether the letter of the defendants to plaintiff, and the answer of plaintiff thereto (leaving the question of revenue stamps out of view), proved a legal contract for the transportation of iron by the defendants for the plaintiff from New York to Chicago upon the terms therein specified, depends upon the question whether the plaintiff became thereby bound to furnish any iron to the defendants for such transportation, as there was no pretence of any consideration for the promise of the defendants to transport the iron, except the mutual promise of the plaintiff to furnish it for that purpose, and to pay the specified price for the service. Unless, therefore, there was a valid undertaking by the plaintiff so to furnish the iron, the promise of the defendants was a mere nude pact, for the breach of which no action can be maintained. The material part of the defendants' letter affecting the question is as follows: "We hereby agree to receive in this

port (New York), either from yard or vessel, and transport to Chicago, by canal and rail or the lakes, for and on account of the Chicago and Great Eastern Railway Company, not exceeding six thousand tons gross (2,240 lbs.) in and during the months of April, May, June, July, and August, 1864, upon the terms and for the price hereinafter specified." This letter was forwarded by the defendants to the plaintiff, April 15, 1864. On the 16th of April the plaintiff answered this letter, the material part of which was as follows: "In behalf of this company I assent to your agreement, and will be bound by its terms." We have seen that the inquiry is, whether this bound the plaintiff to furnish any iron for transportation. It is manifest that the word "agree" in the letter of the defendants was used as synonymous with the word "offer," and that the letter was a mere proposition to the plaintiff for a contract to transport for it any quantity of iron upon the terms specified, not exceeding 6,000 tons, and that it was so understood by the plaintiff. The plaintiff was at liberty to accept this proposition for any specified quantity not beyond that limited; and had it done so, a contract mutually obligatory would have resulted therefrom, for the breach of which by either party the other could have maintained an action for the recovery of the damages thereby sustained. This mutual obligation of the parties to perform the contract would have constituted a consideration for the promise of each. But the plaintiff did not so accept. Upon the receipt of the defendants' offer to transport not to exceed 6,000 tons upon the terms specified, it merely accepted such offer, and agreed to be bound by its terms. This amounted to nothing more than the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendants as it chose; and had there been a consideration given to the defendants for such option, the defendants would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its

election not to require the transportation of any. But there was no consideration received by the defendants for giving any such option to the plaintiff. There being no consideration for the promise of the defendants, except this acceptance by the plaintiff, and that not binding it to furnish any iron for transportation unless it chose, it follows that there was no consideration for any promise of the defendants, and that the breach of such promise furnishes no foundation for an action. The counsel for the defendants insists that the contract may be upheld for the reason that at the time the letters were written the defendants were engaged in transporting iron for the plaintiff. But this had no connection with the letters any more than if the defendants were at the time employed in any other service for the plaintiff. Nor does the fact that the defendants, after the letters were written, transported iron for the plaintiff at all aid in upholding the contract. This did not oblige the plaintiff to furnish any additional quantity, and consequently constituted no consideration for a promise to transport any such. The counsel for the appellant further insists that the letter of defendant was a continuing offer, and that the request of the plaintiff, in August, to receive and transport a specified quantity of iron was an acceptance of such offer, and that the premises then became mutually obligatory, if not so before. This position cannot be maintained. Upon receipt of the defendants' letter, the plaintiff was bound to accept in a reasonable time, and give notice thereof, or the defendant was no longer bound by the offer. The judgment appealed from must be affirmed with costs.

All the judges concurring except ALLEN, J., who, having been of counsel, did not sit.

Judgment affirmed.[1]

[1] Compare Great Northern Railway Co. v. Witham, L. R. 9 C. P. 16 (1873); Morrill v. Tehama M. & M. Co., 10 Nev. 125, 134–137 (1875); and Campbell v. Lambert, 36 La. Ann. 35 (1884). See Wam. St. Cas., §§ 22–26, 56, 57, 101.

FAWCETT ET AL. *v.* FRESHWATER.

Supreme Court of Ohio, 1877.

[*Reported in* 31 *Ohio St.* 637.]

MOTION for leave to file petition in error to reverse the judgment of the District Court of Carrol County.

The action in the Court of Common Pleas was brought by R. W. Freshwater, the payee, against Thomas McCort, principal, and C. W. Fawcett and Richard Bracken, sureties, on a promissory note for $1,250, dated October 5, 1869, due in six months, at eight per cent interest after maturity, upon which payment of the interest was credited each year from April 5, 1870, to April 5, 1875.

McCort, the principal, made no defence.

Fawcett and Bracken, the sureties, defended on the ground that their relation to the note was known to Freshwater, and that the latter, by an agreement with McCort, had, for a valuable consideration, extended the time of payment of the note, for one year from April 5, 1875, without their knowledge or consent.

The reply denied the averments of the answer as to the extension of time.

It is sufficient to say that the testimony tends to sustain the defence made by the sureties.

The bill of exceptions shows that the court found as follows: "That unless there was a payment of interest in advance, the contract to extend the time of payment for one year would not relieve the surety, although there was an agreement to extend the time of payment of said note for one year, upon the payment of eight per cent interest on said note, said eight per cent being the amount stated in said note."

There was a judgment for the plaintiff against all the defendants for the full amount due on the note.

On error this judgment was affirmed in the District Court.

By this proceeding, the plaintiffs in error (the sureties) seek the reversal of both judgments.

Shober & Raley, for the motion, cited Kittridge *v.* McComb, 14 Ohio, 348; Wood *v.* Newkirk, 15 Ohio St. 295.

Trainer & Cook and *H. J. Eckley,* contra, cited Jenkins *v.* Clarkson, 7 Ohio, pt. 1, 75; Bank of Steubenville *v.* Carroll's Adm'rs, 5 Ohio, 214; Bank of Steubenville *v.* Hoge et al., 6 Ohio, 17; Farmers' Bank of Canton *v.* Reynolds, 13 Ohio, 85; Blazer, Cormine, Gregg & Co. *v.* Bundy et al., 15 Ohio St. 57; Ward & Co. *v.* Week Bros. et al., 17 Ohio St. 159; Reynolds *v.* Ward, 5 Wend. 510; M. Lemor *v.* Powell et al., 12 Wheat. 554; Abel *v.* Alexander, 45 Ind. 523; Menifee *v.* Clark, 35 Ind. 304; Bramor *v.* Yante, 1 Blackf. 392; Naylor *v.* Moody, 3 Blackf. 92; Caman *v.* The State, 4 Blackf. 241; Porter *v.* Moore, 5 Blackf. 367; Hunt *v.* Postlewait, 28 Iowa, 427; Jones et al. *v.* Brown, 11 Ohio St. 601; 31 Md. 126.

It is definitely settled that payment of the part of the debt already due will not support a contract. "A valid subsisting legal obligation is no consideration of a contract." Smith *v.* Bartholomew, 1 Met. 276; Jenkins *v.* Clarkson, 7 Ohio, 75; 31 Md. 126.

GILMORE, J. The only question is: Did the Court of Common Pleas err in applying the law to the conclusions of fact found?

To transpose and restate these findings, as we understand them, they are, in effect, as follows: As conclusions of fact, the court found that there was an agreement between the payee and principal of the note, which was past due, to extend the time of its payment for one year, in consideration of the same rate of interest as that named in the note, of which agreement the sureties had no knowledge; and that as a conclusion of law thereon, the court

held that the agreement was not valid, and did not discharge the sureties, because the interest was not paid in advance.

We are not embarrassed with any question as to what the nature and terms of the contract were, for they are clearly stated in the findings of the court.

In this state such a contract is valid and binding between the parties, without the payment of the stipulated interest in advance, and if entered into without the knowledge of the sureties, will discharge them. McComb *v.* Kittridge, 14 Ohio, 348.

In Jones *v.* Brown, 11 Ohio St. 609, GHOLSON, J., referring to the case cited, said: "The views we have expressed, proceed on the circumstances of this case, and in no respect militate with the decision in McComb *v.* Kittridge. We understand that case as deciding that a valid promise to pay interest on a note past due, for a definite future period, is a sufficient consideration for an agreement to forbear for that time." This court has never expressed a doubt as to the correctness of the decision in McComb *v.* Kittridge, on the point so clearly stated in the latter clause of the above quotation. On the contrary, on the point in question, McComb *v.* Kittridge has been expressly followed in two other cases: Blazer et al. *v.* Bundy, 15 Ohio St. 57; Wood *v.* Newkirk, 15 Ohio St. 295.

We see no good reason for departing from the law as thus laid down and heretofore followed in this court. We therefore hold that the Court of Common Pleas erred in applying the law to the conclusions of fact found in this case.

Motion granted. The judgments of the courts below reversed; a new trial granted; for which the cause is remanded to the Court of Common Pleas.

Judgment accordingly.

TURNBULL *v.* BROCK.

Supreme Court of Ohio, 1877.

[*Reported in* 31 *Ohio St.* 649.]

MOTION for leave to file a petition in error to reverse the judgment of the District Court of Greene County.

The plaintiff in error brought an action against Elijah S. Carr, D. S. Horney, and the defendant in error, Brock, in the Court of Common Pleas, upon a promissory note executed by said defendants, July 13, 1876, and given for the payment of $1,839, at five months and ten days from its date. Brock alleged by his answer that he was surety only on the note for Carr and Horney, who were principal makers; that when the note became due, the plaintiff, in consideration of the payment of $200, then made to him by Carr and Horney to apply on the amount due, agreed to extend the time for the payment of balance until the 10th day of the month then next, and that this agreement for such extension was made without his knowledge or assent. This agreement was denied by the reply. Carr and Horney were in default. A trial was had on the issue thus joined, and resulted in a verdict and judgment for the plaintiff against Brock. On error the District Court reversed the judgment for an alleged erroneous instruction to the jury, not necessary here to notice. The agreement set up in the answer seems to have been treated in both courts below as valid, if established.

E. H. Munger, for the motion.

Charles Darlington, contra.

BY THE COURT. There is manifest error in the judgment of the District Court. It is immaterial whether there was error in the instructions given to the jury in the Court of Common Pleas or not. The plaintiff was entitled to judgment on the pleadings. Code, § 384. A promise

not supported by a consideration creates no legal obligation; and hence its non-performance creates no legal liability. Part payment of a promissory note or debt, already due, is not a sufficient consideration for an agreement to extend the time for the payment of the balance. The makers of the note were under a legal obligation to pay the whole amount, which necessarily included every part, and the plaintiff, in receiving a part, obtained only what, and indeed less than he was entitled to. No benefit, profit, or advantage, in a legal sense, resulted to the plaintiff, nor any detriment or loss to the defendant. The promise alleged, in point of legal obligation, was in no wise different than if it had been a mere naked agreement to extend the time for the payment of the entire amount due.

Motion granted. Judgment of the District Court reversed, and that of the Common Pleas affirmed.

ALFRED F. DUNHAM, Respondent, *v.* EDMUND GRISWOLD, Appellant.

Court of Appeals of New York, 1885.

[*Reported in* 100 *N. Y.* 224.]

APPEAL from judgment of the general term of the Supreme Court, in the second judicial department, entered upon an order made February 13, 1883, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

James J. Fox, for appellant. The alleged account stated and agreement are not binding on the defendant, since they were executed by him under duress, caused by threats of a criminal prosecution and imprisonment on a criminal charge, — i. e., the charge of swindling or embezzlement.

(Leopold *v.* Senior, 7 N. Y. Weekly Dig. 438; Foshay *v.* Ferguson, 5 Hill, 154; Mathews *v.* Baird, 6 Mass. 506; Sear *v.* Cohen, 45 L. T. 589; Haynes *v.* Rudd, 30 Hun, 238; Tilley *v.* Damon, 11 Cush. 247; Osborn *v.* Robbins, 36 N. Y. 365; 1 Greenl. on Ev., § 193; 2 id., §§ 121, 310; Bispham's Eq., § 230.) The burden of proof was on the plaintiff, at the close of defendant's case, to either contradict and rebut defendant's evidence, or to show that there was no duress, on the ground that defendant could have been successfully prosecuted criminally on the charge of swindling or embezzlement. (Appleby *v.* A. F. Ins. Co., 54 N. Y. 253; Wambough *v.* Cooper, 2 Hun, 428.)

John H. Clapp, for the respondent. The statement of account and agreement was valid and binding upon the parties regardless of the merits of the original claim. (Adams *v.* Sage, 28 N. Y. 103; Wehrum *v.* Krum, 61 id. 623; Kidder *v.* Horrobin, 72 id. 159; Feeter *v.* Weber, 78 id. 337.) Threat of legal proceedings, even including arrest, is not sufficient to constitute duress. (Quincy *v.* White, 63 N. Y. 370.)

EARL, J. The plaintiff claimed that prior to September, 1881, he intrusted the defendant with certain securities which were to be converted into money and the proceeds invested for him, but that the defendant converted the proceeds to his own use, and he claimed that the defendant was indebted to him on account of such proceeds in the sum of $9,000; and to adjust the claim of the plaintiff, which we may assume the defendant disputed, he settled with the plaintiff, and an account was stated in which the defendant acknowledged that there was $9,000 due the plaintiff, and he executed a written agreement to pay the plaintiff that sum. This action was brought to recover the sum which was thus adjusted by the settlement and which the defendant thus agreed to pay.

It was no defence to this action for the defendant to prove that he did not owe the plaintiff anything. The

plaintiff having made a claim against him, and he having disputed it, and the parties having settled the dispute by agreeing upon the amount due in an account stated which the defendant promised to pay, that promise is founded upon a sufficient consideration and can be enforced against him, although he might be able to prove that nothing was in fact due from him. (Stewart *v.* Ahrenfeldt, 4 Denio, 189; Wehrum *v.* Kuhn, 61 N. Y. 623; Feeter *v.* Weber, 78 id. 334, 337.)

But the defendant further claims that he made the adjustment and promise and signed the agreement to pay the plaintiff under duress, and hence that he is not bound by the agreement. The facts as to the duress depend entirely upon the evidence of the defendant, and it was, for the trial court, under all the circumstances of the case, to determine to what extent such evidence was entitled to credence. Upon the evidence it was a question of fact whether the agreement was executed in consequence of any duress whatever. The court could have found, and we may assume did find, that the only threats used, if any, were to arrest the defendant in a civil action for the wrong which he had done the plaintiff. The negotiations for the settlement were pending several days. The defendant was not under arrest or restrained of his liberty in any way. He appears to have been a business man in the full possession of his faculties, and the plaintiff was an old man, his uncle. A mere threat to sue the defendant and to arrest him in such suit, or by virtue of an execution which could be issued upon a judgment obtained therein, would not be such duress as would avoid a promise induced by such threat. (1 Pars. on Cont. [5th ed.] 393; Shepard *v.* Watrous, 3 Caines, 166; Farmer *v.* Walter, 2 Edw. Ch. 601; Knapp *v.* Hyde, 60 Barb. 80.) When there is no arrest, no imprisonment, no actual force, and it is claimed that a promise was obtained by duress *per minas*, then whether or not the promise was obtained by duress must usually be a question of fact, and the question cannot be

determined as one of law. It is not sufficient in such a case to satisfy the trial court that the threats were uttered; but it must also be shown that they constrained the will of the promisor and induced the promise. The trial court in this case was not bound to believe the defendant when he testified that he made the adjustment with the plaintiff and signed the agreement to pay him the $9000 solely in consequence of the threats. Whether he did or not was, under the circumstances disclosed in this case, and from the character of the evidence given, an inference of fact with which we have no jurisdiction to interfere.

The judgment should be affirmed.

All concur. *Judgment affirmed.*[1]

DEVECMON *v.* SHAW.

Court of Appeals of Maryland, 1888.

[*Reported in* 69 *Md.* 199.]

ACTION against the defendants as executors of John S. Combs, deceased. The plaintiff appealed.

J. Semmes Devecmon and *Ferdinand Williams*, for the appellant.

A. Hunter Boyd, for the appellees.

BRYAN, J. John Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared in the common courts, and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books

[1] On compromising disputed claims see Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449 (1870); Miles *v.* New Zealand Alford Estate Co., 32 Ch. Div. 266 (1886); Adams *v.* Adams, 70 Iowa, 253 (1886); Brown *v.* Ladd, 144 Mass. 310 (1887); Grandin *v.* Grandin, 49 N. J. L. 508 (1887); Rue *v.* Meirs, 43 N. J. Eq. 377 (1887). But see Langdell's Sum. Con. ss. 56–58. See also Wam. St. Cas., §§ 11, 24.

of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk for several years. The plaintiff then made an offer of testimony, which is thus stated in the bill of exceptions: "That the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by the said plaintiff at the instance and request of said Combs, and upon a promise from him that he would reimburse and repay to the plaintiff all money expended by him in said trip; and that the trip was so taken and the money so expended by the said plaintiff, but that the said trip had no connection with the business of said Combs; and that said Combs spoke to the witness of his conduct in being thus willing to pay his nephew's expenses as liberal and generous on his part." On objection, the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was, the case, that the plaintiff would not have taken a trip to Europe at his own expense. But whether this be so or not, the testimony would have tended to show that the plaintiff incurred expenses at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present, or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefited by the expenditure of his own money. He was induced by this promise to spend it in this way instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretence.

As the plaintiff, on the theory of this evidence, had ful-

filled his part of the contract, and nothing remained to be done but the payment of the money by the defendant, there could be a recovery in *indebitatus assumpsit*, and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendants' testator in his lifetime, at his request." In the bill of particulars we find this item: "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses to Europe and return, the said John S. Combs, now deceased, having promised me in 1878, 'that if I would contribute part of my own money towards the trip, he would give me a part of his, and would make up to me my part,' and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted.

The defendants offered the following prayer, which the court granted: —

"The defendants, by their attorneys, pray the court to instruct the jury that there is no sufficient evidence in this case to entitle the plaintiff to recover the interest claimed in bill of particulars, marked 'Exhibit No. 1, Bill of Particulars.'"

The only evidence bearing on this question is the account taken from the books of the deceased, which was offered in evidence by the plaintiff. This account showed on its face a final settlement of all matters embraced in it. In the absence of proof showing errors of some kind, the parties must be concluded by it in all respects. We think the prayer was properly granted.

Judgment reversed, and new trial ordered.[1]

[1] Compare Wolford v. Powers, 85 Ind. 294 (1882); Talbott v. Stemmons' Exr., 89 Ky. 222 (1889); Hamer v. Sidway, 124 N. Y. 538 (1891). See Wam. St. Cas., § 25.

STENSGAARD v. SMITH.

Supreme Court of Minnesota, 1890.

[*Reported in* 43 *Minn.* 11.]

ACTION brought in the District Court for Ramsey County, to recover $13,000 damages for breach of the alleged contract set forth in the opinion, the complaint alleging that immediately after the date of such contract the land described in it rapidly increased in value, and within the period of three months designated in such contract, the land was worth in market and could and would have been sold by plaintiff for $30,000, except for defendant's breach of the contract on January 12, 1887, by conveying the land to another. At the trial, before Kelly, J., a verdict was rendered for defendant at the close of plaintiff's case. A new trial was refused, and plaintiff appealed.

John W. Willis and *Charles A. Willard*, for appellant.

Kueffner & Fauntleroy, for respondent.

DICKINSON, J. This action is for the recovery of damages for breach of contract. The rulings of the court below, upon the trial, were based upon its conclusion that no contract was shown to have been entered into between these parties. We are called upon to review the case upon this point. The plaintiff was engaged in business as a real estate broker. On the 11th of December, 1886, he procured the defendant to execute the following instrument, which was mostly in printed form:

"ST. PAUL, December 11, 1886.

"In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensgaard the exclusive sale, for three months from date, the following property, to wit: [Here follows a description of the property, the

terms of sale, and some other provisions not necessary to be stated]. I further agree to pay said L. T. Stensgaard a commission of two and one-half per cent on the first $2,000, and two and one-half per cent on the balance of the purchase price, for his services rendered in selling of the above-mentioned property, whether the title is accepted or not, and also whatever he may get or obtain for the sale of said property above $17,000 for such property, if the property is sold.

"JOHN SMITH."

The evidence showed that the plaintiff immediately took steps to effect a sale of the land, posted notices upon it, published advertisements in newspapers, and individually solicited purchasers. About a month subsequent to the execution by the defendant of the above instrument, he himself sold the property. This constitutes the alleged breach of contract for which a recovery of damages is sought.

The court was justified in its conclusion that no contract was shown to have been entered into, and hence that no cause of action was established. The writing signed by the defendant did not of itself constitute a contract between these parties. In terms indicating that the instrument was intended to be at once operative, it conferred present authority on the plaintiff to sell the land, and included the promise of the defendant that, if the plaintiff should sell the land, he should receive the stated compensation. This alone was no contract, for there was no mutuality of obligation, nor any other consideration for the agreement of the defendant. The plaintiff did not by this instrument obligate himself to do anything, and therefore the other party was not bound. Bailey *v.* Austrian, 19 Minn. 465, (535); Tarbox *v.* Gotzian, 20 Minn. 122 (139). If, acting under the authority thus conferred, the plaintiff had, before its revocation, sold the land, such performance would have completed a contract, and the plaintiff would have earned

the compensation promised by the defendant for such performance. Andreas *v.* Holcombe, 22 Minn. 339; Ellsworth *v.* Southern Minn. Ry. Extension Co., 31 Minn. 543 (18 N. W. Rep. 822). But so long as this remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the defendant. The instrument does, it is true, commence with the words: "In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property," etc.; but no such agreement on the part of the plaintiff was shown on the trial to have been actually made, although it was incumbent upon him to establish the existence of a contract as the basis of his action. This instrument does not contain an agreement on the part of the plaintiff, for he is no party to its execution. It expresses no promise or agreement except that of the defendant. It may be added that the language of the "consideration" clause is not such as naturally expresses the fact of an agreement having been already made on the part of the plaintiff. Of course, no consideration was necessary to support the present, but revocable authorization to sell. It is difficult to give any practical effect to this clause in the construction of the instrument. It seems probable, in the absence of proof of such an agreement, that this clause had no reference to any actual agreement between these parties, but was a part of the printed matter which the plaintiff had prepared for use in his business, with the intention of making it effectual by his own signature. If he had appended to this instrument his agreement to accept the agency, or even if he had signed this instrument, this clause would have had an obvious meaning.

This instrument, executed only by the defendant, was effectual, as we have said, as a present, but revocable, grant of authority to sell. It involved, moreover, an offer on the part of the defendant to contract with the plaintiff that the latter should have, for the period of three months, the exclusive right to sell the land. This action is based upon the theory that such a contract was entered into; but,

to constitute such a contract, it was necessary that the plaintiff should in some way signify his acceptance of the offer, so as to place himself under the reciprocal obligation to exert himself during the whole period named to effect a sale. No express agreement was shown. The mere receiving and retaining this instrument did not import an agreement thus to act for the period named, for the reason that whether the plaintiff should be willing to take upon himself that obligation or not, he might accept and act upon the revocable authority to sell expressed in the writing; and if he should succeed in effecting a sale before the power should be revoked, he would earn the commission specified. In other words, the instrument was presently effectual and of advantage to him, whether he chose to place himself under contract obligations or not. For the same reason the fact that for a day or a month he availed himself of the right to sell conferred by the defendant, by attempting to make a sale, does not justify the inference, in an action where the burden is on the plaintiff to prove a contract, that he had accepted the offer of the defendant to conclude a contract covering the period of three months, so that he could not have discontinued his efforts without rendering himself liable in damages. In brief, it was in the power of the plaintiff either to convert the defendant's offer and authorization into a complete contract, or to act upon it as a naked revocable power, or to do nothing at all. He appears to have simply availed himself, for about a month, of the naked present right to sell if he could do so. He cannot now complain that the land-owner then revoked the authority, which was still unexecuted. It may be added that there was no attempt at the trial to show that the plaintiff notified the defendant that he was endeavoring to sell the land; and there is but little, if any, ground for an inference from the evidence that the defendant in fact knew it.

The case is distinguishable from those where, under a unilateral promise, there has been a performance by the

other party of services, or other thing to be done, for which, by the terms of the promise, compensation was to be made. Such was the case of Goward *v.* Waters, 98 Mass. 596, relied upon by the appellant as being strictly analogous to this case. In the case before us, compensation was to be paid only in case of a sale of the land by the plaintiff. He can recover nothing for what he did, unless there was a complete contract; in which case, of course, he might have recovered damages for its breach.

Order affirmed.[1]

EDWARD S. JAFFRAY ET AL., Respondents, *v.* SIEGFRIED DAVIS ET AL., Appellants.

Court of Appeals of New York, Second Division, 1891.

[*Reported in* 124 *N. Y.* 164.]

APPEAL from judgment of the general term of the Supreme Court in the first judicial department, entered upon an order made May 21, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This was an action to recover a balance claimed to be due upon an indebtedness.

The facts, so far as material, are stated in the opinion.

O. F. Wisner, for appellants. If the court can see any, even the slightest, consideration for the creditor's promise, and if the debtor give additional security, accepted by the creditor, the creditor is bound. (Carrington *v.* Crocker, 37 N. Y. 338; Boyd *v.* Hitchcock, 20 Johns. 76; Kellogg *v.* Richards, 14 Wend. 116; Ludington *v.* Bell, 77 N. Y. 138; Mitchell *v.* Wheaton, 46 Conn. 316; Brooks *v.* White, 2 Metc. 285; Jones *v.* Perkins, 64 Am. Dec. 136; Hinkley *v.* Arey, 27 Me. 362; Day *v.* Gardner, 7 At. Rep. 365;

[1] A motion for a reargument of this case was denied April 9, 1890. — REPORTER.

Bailey *v.* Day, 26 Me. 88.) Any security given by the debtor for part of the debt, which the creditor agrees to accept in full, binds the creditor. (20 Johns. 76; 14 Wend. 116; 74 N. Y. 138; 64 Am. Dec. 136; Warred *v.* Skinner, 20 Conn. 559; Wheeler *v.* Wheeler, 11 Vt. 60; Lee *v.* Oppenheim, 32 Me. 253; 6 Wait's Act. & Def. 414; Phillips *v.* Berger, 2 Barb. 608; Little *v.* Hobbs, 34 Me. 357.) The original indebtedness of defendants being upon an open account, and plaintiffs having agreed to accept the debtor's promissory notes and chattel mortgage in full satisfaction and discharge of the original indebtedness, they are bound. (21 Am. Law Reg. 641, 642; Babcock *v.* Hawkins, 23 Vt. 561; Jaffray *v.* Crane, 50 Wis. 349; Butler *v.* Miller, 1 N. Y. 496; Hall *v.* Sampson, 35 id. 274; Farmers' Bank *v.* Cowan, 2 Keyes, 217; Judson *v.* Easton, 58 N. Y. 664; Allison *v.* Abendroth, 15 N. E. Rep. 606; Pullman *v.* Taylor, 50 Miss. 251.) By the laws of Michigan, when this agreement was made, these defendants were each entitled to $250 worth of the property mortgaged, as exempt from execution. This they were each entitled to hold free from any claim of creditors. (Skinner *v.* Shannon, 44 Mich. 86; Stewart *v.* Brown, 37 N. Y. 350.) By virtue of this agreement and the execution and delivery to them of the chattel mortgage, the defendants put themselves in a position where they could no longer claim their exemption as against plaintiff's demand. (Bump on Fraud, 14.)

Isaac L. Miller, for respondents. In the case of an undisputed indebtedness, the acceptance of the notes of the debtor for a smaller sum does not preclude the creditor from recovering the balance of the original claim. (Pinnel's Case, 4 Coke, 117; Fitch *v* Sutton, 5 East, 230; Cumber *v.* Wayne, 1 Strange, 426; 1 Smith's L. C. 439; Down *v.* Hatch, 10 Ad. & El. 121; Leake on Cont. [ed. 1878] 888; Foakes *v.* Beer, 36 Eng. Rep. 194; Bridge Co. *v.* Murphy, 13 Kan. 35; Otto *v.* Klauber, 23 Wis. 471; Wheeler *v.* Wheeler, 11 Vt. 60, 66; Bright *v.*

Coffin, 15 Ind. 371, 374; Curtis *v.* Morton, 20 Ill. 558, 577; Day *v.* Gardner, 7 At. Rep. 365; Bryant *v.* Brazil, N. W. Rep. 117; Kooker *v.* Hyde, 21 id. 52; St. Louis *v.* Davis, 11 Pac. Rep. 421; Harriman *v.* Harriman, 12 Gray, 341; Hayes *v.* Davidson, 70 N. C. 573; Daniels *v.* Hatch, 21 N. J. L. 391; Smith *v.* Phillips, 77 Vt. 548; Ryan *v.* Ward, 48 N. Y. 204; Bunge *v.* Koop, id. 225; Bliss *v.* Schwartz, 66 id. 451; Redfield *v.* H. P. Co., 56 id. 354, 358; Muller *v.* Coates, 66 id. 609; Irvine *v.* Milbank, 15 Abb. [N. S.] 378; Carrington *v.* Crocker, 37 N. Y. 337; White *v.* Kuntz, 107 id. 518, 524; Conklin *v.* King, 10 id. 440; Benedict *v.* Ray, 35 Hun, 34, 36; Fellows *v.* Stevens, 24 Wend. 294; Moss *v.* Shannon, 1 Hilt. 177; Williams *v.* Corrington, id. 515; Ludington *v.* Bell, 77 N. Y. 143; Gray *v.* Barton, 55 id. 68, 71.) There is neither injustice nor hardship in requiring defendants to do as they agreed, — i. e., pay for the merchandise in question, they having received a full equivalent therefor. (1 Story's Eq. Juris. §§ 18–23; 48 N. Y. 430; 55 id. 456.) There is no accord and satisfaction. (Brooks *v.* Moore, 67 Barb. 393; Williams *v.* Irving, 47 How. Pr. 440, 442.) As actual payment of the smaller sum would not discharge the debt, the acceptance of the promise to pay, — i. e., defendants' promissory note would, of course, fail to extinguish it. (Keeler *v.* Salisbury, 33 N. Y. 653; Conklin *v.* King, 10 Barb. 372; 10 N. Y. 440.) The giving of a chattel mortgage by defendants on their own property in no way strengthens the defendants' position. (Keeler *v.* Salisbury, 27 Barb. 485; 33 N. Y. 653.) If the case were governed by the laws of Michigan, it would be immaterial. (Chapin *v.* Dobson, 78 N. Y. 79; Monroe *v.* Douglass, 5 id. 447; Falkner *v.* Hart, 82 id. 418.) No fact can be considered by this court for the purpose of reversing a judgment, unless it is either stated in the findings or requested to be found on uncontroverted evidence. (Thompson *v.* Bank B. N. A., 82 N. Y. 1, 7; Burnap *v.* N. Bank, 96 id. 125, 131.)

POTTER, J. The facts found by the trial court in this case were agreed upon. They are simple, and present a familiar question of law. The facts are that defendants were owing plaintiffs on the 8th day of December, 1886, for goods sold between that date and the May previous at an agreed price, the sum of $7,714.37, and that on the 27th of the same December the defendants delivered to the plaintiffs their three promissory notes amounting in the aggregate to three thousand four hundred and sixty-two twenty-four one-hundredths dollars secured by a chattel mortgage on the stock, fixtures, and other property of defendants, located in East Saginaw, Michigan, which said notes and chattel mortgage were received by plaintiffs under an agreement to accept same in full satisfaction and discharge of said indebtedness. "That said notes have all been paid and said mortgage discharged of record."

The question of law arising from these facts and presented to this court for its determination, is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved (if not decided) in Pinnel's case (5th Co. R. 117), "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of

the question, to criticise and condemn its reasonableness, justice, fairness, or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in Pinnel's case (supra) and Cumber *v.* Wane (1 Str. 426); Foakes *v.* Beer (L. R. [9 App. Cas.] 605; 36 English Reports, 194); Goddard *v.* O'Brien (L. R. [9 Q. B. Div.] 37; Vol. 30, Am. Law Register, 637, and notes).

The steadfast adhesion to this doctrine by the courts in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations, demonstrates the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject, for while the courts still hold to the doctrine of the Pinnel and Cumber and Wane cases (supra), they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or in other words, to extract, if possible, from the circumstances of each case, a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defence to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the courts to settled law, and at the same time enable us perhaps more satisfactorily to decide whether there was a good consideration to support the agreement in this case, to refer to the consideration in a few of the numerous cases which the courts have held to be sufficient to support the new agreement.

Lord Blackburn said in his opinion in Foakes *v.* Beer (supra), and while maintaining the doctrine "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk, or robe, etc., in satisfaction is good," quite regardless of the amount of the debt. And it was further said by him in the same opinion "that pay-

ment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time," "and so if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day at York, and you will accept it in full satisfaction for the whole ten pounds, it is a good satisfaction." It was held in Goddard *v.* O'Brien (L. R. [9 Q. B. Div.] 37; 21 Am. L. Reg. [N. S.] 637): "A, being indebted to B in 125 pounds 7s. & 9d., for goods sold and delivered, gave B a check (negotiable, I suppose) for 100 pounds payable on demand, which B accepted in satisfaction, was a good satisfaction." HUDDLESTON, B., in Goddard *v.* O'Brien (supra), approved the language of the opinion in Sibree *v.* Tripp (15 M. & W. 26), "that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt which was not negotiable."

It was held in Bull *v.* Bull, 43 Conn. 455, "and although the claim is a money demand liquidated and not doubtful, and it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good, no matter what the value."

As it was held in Cumber *v.* Wane (supra), that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum*, but if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.

It was held in LaPage *v.* McCrea, 1 Wend. 164, and in Boyd *v.* Hitchcock, 20 Johns. 76, that "giving further security for part of a debt or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction."

That "if a debtor gives his creditor a note indorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." (Varney *v.* Commey, 3 East, 25.) And so it has been held "where by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred or a burden imposed, a new consideration arises out of the transaction and gives validity to the agreement of the creditor" (Rose *v.* Hall, 26 Conn. 392), and so "payment of less than the whole debt, if made before it is due or at a different place from that stipulated, if received in full, is a good satisfaction." (Jones *v.* Bullitts, 2 Lit. 49; Ricketts *v.* Hall, 2 Bush, 249; Smith *v.* Brown, 3 Hawks. [N. C.] 580; Jones *v.* Perkins, 29 Miss. 139; Schweider *v.* Lang, 29 Minn. 254; 43 Am. R. 202.)

In Watson *v.* Elliott, 57 N. H. 511–513, it was held, "it is enough that something substantial, which one party is not bound by law to do, is done by him; or something which he has a right to do he abstains from doing at the request of the other party, is held a good satisfaction."

It has been held in a number of cases that if a note be surrendered (by the payee to the maker), the whole claim is discharged, and no action can afterwards be maintained on such instrument for the unpaid balance. (Ellsworth *v.* Fogg, 35 Vt. 355; Kent *v.* Reynolds, 8 Hun, 559.)

It has been held that a partial payment made to another, though at the creditor's instance and request, is a good discharge of the whole debt. (Harper *v* Graham, 20 Ohio, 106.) "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do, or at least something different. It may be more or it may be less, as a matter of fact."

It was held by the Supreme Court of Pennsylvania in Mechanics' Bank *v.* Houston (February 13, 1882, 11 W. Note, case 389): "The decided advantage which a creditor

acquires by the receipt of a negotiable note for a part of his debt, is, by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable."

It has been held that a payment in advance of the time if agreed to is full satisfaction for a larger claim not yet due. (Brooks *v.* White, 2 Met. 283; Bowker *v.* Childs, 3 Allen, 434.)

In some States, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under consideration, have by statute changed the law upon that subject by providing, "no action can be maintained upon a demand which has been cancelled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration, however small." (Citing Weymouth *v.* Babcock, 42 Maine, 42.)

And so in Gray *v.* Barton, 55 N. Y. 68, where a debt of $820 upon a book account was satisfied by the payment of $1.00 by calling the balance a gift, though the balance was not delivered except by fiction, and the receipt was in the usual form and was silent upon the subject of a gift, and this case was followed and referred to in Ferry *v.* Stephens, 66 N. Y. 321.

So it was held in Mitchell *v.* Wheaton, 46 Conn. 315; 33 Am. R. 24, that the debtor's agreement to pay and the payment of $150 with the costs of the suit upon a liquidated debt of $299 satisfied the principal debt.

These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the old law," as it is characterized in Johnston *v.* Brannan, 5 Johns. 268–272, or as it is called in Kellogg *v.* Richards, 14 Wend. 116, "technical and not very well supported by reason," or, as may be more practically stated, a rule that "a bar of gold worth $100 will discharge a debt

of $500, while 400 gold dollars in current coin will not." See note to Goddard *v.* O'Brien, supra, in A. Law Register, New Series, vol. 21, pp. 640, 641.

The state of the law upon this subject, under the modification of later decisions both in England and in this country, would seem to be as expressed in Goddard *v.* O'Brien (Queen's Bench Division, supra). "The doctrine in Cumber *v.* Wane is no doubt very much qualified by Sibree *v.* Tripp, and I cannot find it better stated than in 1st Smith's Leading Cases [7th ed.], 595." The general doctrine in Cumber *v.* Wane, and the reason of all the exceptions and distinctions which have been engraved on it, may perhaps be summed up as follows, viz.. "That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement." (Bull *v.* Bull, 43 Conn. 455; Fisher *v.* May, 2 Bibb, 449; Reed *v.* Bartlett, 19 Pick. 273; Union Bank *v.* Geary, 5 Peters, 99–114; LaPage *v.* McCrea, 1 Wend. 164; Boyd *v.* Hitchcock, 20 Johns. 76; Brooks *v.* White, 2 Metc. 283; Jones *v.* Perkins, 29 Miss. 139–141; Hall *v.* Smith, 15 Iowa, 584; Babcock *v.* Hawkins, 23 Vt. 561.)

In the case at bar the defendants gave their promissory notes upon time for one half of the debt they owed plaintiff, and also gave plaintiff a chattel mortgage on the stock, fixtures, and other personal property of the defendants under an agreement with plaintiff to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiff then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was by the parties substi-

tuted in place of the former. The consideration of the new agreement was that the plaintiff, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiff perhaps trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security.

It was some trouble at least, and perhaps some expense to the defendants, to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions or the power of disposing of this property, and gave the plaintiff such ownership as against the defendants, and the claims thereto of defendants' creditors, if there were any.

It seems to me, upon principle and the decisions of this State (save perhaps Keeler *v.* Salisbury, 33 N. Y. 653, and Platts *v.* Walrath, Lalor's Supp. 59, which I will notice further on), and of quite all of the other States, the transactions between the plaintiff and the defendants constitute a bar to this action. All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in the opinion of Judge Andrews in Allison *v.* Abendroth, 108 N. Y. 470, from which I quote: "But it is held that where there is an independent consideration, or the creditor receives any benefit, or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not *nudum pactum*, and the doctrine of the common law to which we have adverted has no application." Upon this distinction the cases rest which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of mu h less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for

a smaller sum. (Curlewis *v.* Clark, 3 Exch. 375.) Following the same principle, it is held that when the debtor enters into a new contract with the creditor, to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners in satisfaction of the joint or copartnership debt is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency or of the parties, or the convenience of the remedy." (Thompson *v.* Percival, 5 B. and Adol. 925.) In perfect accord with this principle is the recent case in this court of Ludington *v.* Bell, 77 N. Y. 138, in which it was held that the acceptance by a creditor of the individual note of one of the members of a copartnership after dissolution for a portion of the copartnership debt was a good consideration for the creditor's agreement to discharge the maker from further liability. (Pardee *v.* Wood, 8 Hun, 584; Douglass *v.* White, 3 Barb. Chy. 621–624.)

Notwithstanding these later and decisive authorities, the plaintiff contends that the giving of the defendants' notes with the chattel mortgage security and the payment, such consideration was insufficient to support the new or substituted agreement, and cites as authority for such contention the cases of Platts *v.* Walrath, Lalor's Supp. 59, and Keeler *v.* Salisbury, 33 N. Y. 648.

Platts *v.* Walrath arose in Justice Court, and the debt in controversy was put forth as a set-off. The remarks of the judge in the former case were quite obiter, for there were various subjects in dispute upon the trial, and from which the justice might have reached the conclusion that he did. The judge in the opinion relied upon says: "Looking at the loose and secondary character of the evidence as stated in the return, it was perhaps a question of fact whether any mortgage at all was given; or, at

least, whether, if given, it was in terms a mere collateral security for the large note," "even the mortgagee was left to parol proof. Did it refer to and profess to be a security for the note of $1,500, or that sum less the fifty dollars agreed to be thrown off, etc., etc.?"

There is so much confusion and uncertainty in the case that it was not thought advisable to publish the case in the regular series of reports. The case of Keeler *v.* Salisbury (supra), is not to be regarded as an authority upon the question, or as approving the case of Platts *v.* Walrath (supra). In the case of Keeler *v.* Salisbury, the debtor's wife had joined in the mortgage given by her husband, the debtor, to effect the compromise, thus releasing her inchoate right of dower. The court held that fact constituted a sufficient consideration to support the new agreement, though the court in the course of the opinion remarked that it had been held that the debtor's mortgage would not be sufficient, and referring to Platts *v.* Walrath. But the court did not otherwise indicate any approval of that case, and there was no occasion to do so, for, as before stated, the court put its decision upon the fact that the wife had joined in the mortgage.

In view of the peculiar facts in these two cases, and the numerous decisions of this and other courts hereinbefore referred to, I do not regard them as authorities against the defendant's contention that the plaintiff's action for the balance of the original debt is barred by reason of the accord and satisfaction, and that the judgment should be reversed, with costs.

All concur.

Judgment reversed.[1]

[1] Compare Harper *v.* Graham, 20 Ohio, 105 (1851); Seymour *v.* Goodrich, 80 Va. 303 (1885); Bender *v.* Been, 78 Iowa, 283 (1889); and Leeson *v.* Anderson, 58 N. W. R. 72 (Mich., 1894). And see Wam. St. Cas., §§ 41–44, 53–57, 85–97.

CARLILL *v.* CARBOLIC SMOKE BALL COMPANY.

Court of Appeal, 1892.

[*Reported in* [1893] 1 *Q. B.* 256.]

APPEAL from a decision of Hawkins, J., [1892] 2 Q. B. 484.

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the "Pall Mall Gazette" of November 13, 1891, and in other newspapers, the following advertisement: "£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1,000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10*s.*, post free. The ball can be refilled at a cost of 5*s.* Address, Carbolic Smoke Ball Company, 27 Princes Street, Hanover Square, London."

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the £100. The defendants appealed.

Finlay, Q. C., and *T. Terrell*, for the defendants. The facts show that there was no binding contract between the parties. The case is not like Williams *v.* Carwardine, 4 B.

& Ad. 621, where the money was to become payable on the performance of certain acts by the plaintiff; here the plaintiff could not by any act of her own establish a claim, for, to establish her right to the money, it was necessary that she should be attacked by influenza, — an event over which she had no control. The words express an intention, but do not amount to a promise: Week *v.* Tibold, 1 Roll. Abr. 6 (M.). The present case is similar to Harris *v.* Nickerson, Law Rep. 8 Q. B. 286. The advertisement is too vague to be the basis of a contract; there is no limit as to time, and no means of checking the use of the ball. Any one who had influenza might come forward and depose that he had used the ball for a fortnight, and it would be impossible to disprove it. Guthing *v.* Lynn, 2 B. & Ad. 232, supports the view that the terms are too vague to make a contract; there being no limit as to time, a person might claim who took the influenza ten years after using the remedy. There is no consideration moving from the plaintiff: Gerhard *v.* Bates, 2 E. & B. 476. The present case differs from Denton *v.* Great Northern Ry. Co., 5 E. & B. 860, for there an overt act was done by the plaintiff on the faith of a statement by the defendants. In order to make a contract by fulfilment of a condition, there must either be a communication of intention to accept the offer, or there must be the performance of some overt act. The mere doing an act in private will not be enough. This principle was laid down by Lord Blackburn in Brogden *v.* Metropolitan Ry. Co. 2 App. Cas. 666. The terms of the advertisement would enable a person who stole the balls to claim the reward, though his using them was no possible benefit to the defendants. At all events, the advertisement should be held to apply only to persons who bought directly from the defendants. But if there be a contract at all, it is a wagering contract, as being one where the liability depends on an event beyond the control of the parties, and which is therefore void under 8 & 9 Vict. c. 109. Or, if not, it is bad under 14 Geo. 3, c. 48,

s. 2, as being a policy of insurance on the happening of an uncertain event, and not conforming with the provisions of that section.

Dickens, Q. C., and *W. B. Allen*, for the plaintiff. [The court intimated that they required no argument as to the question whether the contract was a wager or a policy of insurance.] The advertisement clearly was an offer by the defendants; it was published that it might be read and acted on, and they cannot be heard to say that it was an empty boast, which they were under no obligation to fulfil. The offer was duly accepted. An advertisement was addressed to all the public, — as soon as a person does the act mentioned, there is a contract with him. It is said that there must be a communication of the acceptance; but the language of Lord Blackburn, in Brogden *v.* Metropolitan Ry. Co., *supra*, shows that merely doing the acts indicated is an acceptance of the proposal. It never was intended that a person proposing to use the smoke ball should go to the office and obtain a repetition of the statements in the advertisement. The defendants are endeavoring to introduce words into the advertisement to the effect that the use of the preparation must be with their privity or under their superintendence. Where an offer is made to all the world, nothing can be imported beyond the fulfilment of the conditions. Notice before the event cannot be required; the advertisement is an offer made to any person who fulfils the condition, as is explained in Spencer *v.* Harding, Law Rep. 5 C. P. 561. Williams *v.* Carwardine, *supra*, shows strongly that notice to the person making the offer is not necessary. The promise is to the person who does an act, not to the person who says he is going to do it and then does it. As to notice after the event, it could have no effect, and the present case is within the language of Lord Blackburn in Brogden *v.* Metropolitan Ry. Co., *supra*. It is urged that the terms are too vague and uncertain to make a contract; but, as regards parties, there is no more uncertainty than in all

other cases of this description. It is said, too, that the promise might apply to a person who stole any one of the balls. But it is clear that only a person who lawfully acquired the preparation could claim the benefit of the advertisement. It is also urged that the terms should be held to apply only to persons who bought directly from the defendants; but that is not the import of the words, and there is no reason for implying such a limitation, an increased sale being a benefit to the defendants, though effected through a middleman, and the use of the balls must be presumed to serve as an advertisement and increase the sale. As to the want of restriction as to time, there are several possible constructions of the terms; they may mean that, after you have used it for a fortnight, you will be safe so long as you go on using it, or that you will be safe during the prevalence of the epidemic. Or the true view may be that a fortnight's use will make a person safe for a reasonable time. Then as to the consideration. In Gerhard *v.* Bates, *supra*, Lord Campbell never meant to say that if there was a direct invitation to take shares, and shares were taken on the faith of it, there was no consideration. The decision went on the form of the declaration, which did not state that the contract extended to future holders. The decision that there was no consideration was qualified by the words "as between these parties," the plaintiff not having alleged himself to be a member of the class to whom the promise was made.

Finlay, Q. C., in reply. There is no binding contract. The money is payable on a person's taking influenza after having used the ball for a fortnight, and the language would apply just as well to a person who had used it for a fortnight before the advertisement as to a person who used it on the faith of the advertisement. The advertisement is merely an expression of intention to pay £100 to a person who fulfils two conditions; but it is not a request to do anything, and there is no more consideration in using the ball than in contracting the influenza. That a contract should be completed by a private act is against the lan-

guage of Lord Blackburn in Brogden *v.* Metropolitan Ry. Co., 2 App. Cas. 692. The use of the ball at home stands on the same level as the writing a letter which is kept in the writer's drawer. In Denton *v.* Great Northern Ry. Co., *supra*, the fact was ascertained by a public, not a secret act. The respondent relies on Williams *v.* Carwardine, *supra*, and the other cases of that class; but there a service was done to the advertiser. Here no service to the defendants was requested, for it was no benefit to them that the balls should be used: their interest was only that they should be sold. Those cases also differ from the present in this important particular, that in them the service was one which could only be performed by a limited number of persons, so there was no difficulty in ascertaining with whom the contract was made. It is said the advertisement was not a legal contract, but a promise in honor, which, if the defendants had been approached in a proper way, they would have fulfilled. A request is as necessary in the case of an executed consideration as of an executory one: Lampleigh *v.* Braithwait, 1 Sm. L. C., 9th ed., pp. 153, 157, 159; and here there was no request. Then, as to the want of limitation as to time, it is conceded that the defendants cannot have meant to contract without some limit, and three limitations have been suggested. The limitation "during the prevalence of the epidemic" is inadmissible, for the advertisement applies to colds as well as influenza. The limitation "during use" is excluded by the language "after having used." The third is, "within a reasonable time," and that is probably what was intended; but it cannot be deduced from the words; so the fair result is that there was no legal contract at all.

Lindley, L. J. [The Lord Justice stated the facts, and proceeded:] I will begin by referring to two points which were raised in the court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to

dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention.

Then, what is left? The first observation I will make is that we are not dealing with any inference of fact. We are dealing with an express promise to pay £100 in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable—"£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball."

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "£1,000 is deposited with the Alliance Bank, showing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter, — that is, the sincerity of his promise to pay this £100 in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer.

In point of law this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is Williams *v.* Carwardine, *supra*, which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary, in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required — which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of Brogden *v.* Metropolitan Ry. Co., *supra*, — if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you cannot really construe it as a promise, — that the vagueness of the language shows that a legal promise was never intended or

contemplated. The language is vague and uncertain in some respects, and particularly in this, that the £100 is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to show what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the "increasing epidemic" (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, What is a reasonable time? It has been sug-

gested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way; find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold, and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that £100 will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention, — that is, the consideration. It has been argued that this is *nudum pactum*, — that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put

himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

We were pressed upon this point with the case of Gerhard *v.* Bates, *supra*, which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to show any consideration. Lord Campbell's judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by showing that there was no consideration shown for the promise to him. I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to show what a *société anonyme* was, and had alleged the promise to have been not only to the first bearer, but to anybody who should become the bearer. There was no such allegation; and the court said, in the absence of such allegation, they did not know (judicially, of course) what a *société anonyme* was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

BOWEN, L. J. I am of the same opinion. We were asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public. The defendants contend, next, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. It was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made, — that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the document shows that no contract whatever was intended. It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of

it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had previously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: "£100 will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks." And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. Then again it was said: "How long is this protection to endure? Is it to go on forever, or for what limit of time?" I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected forever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the

ball. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: "During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using" (not "who had used") "the carbolic smoke ball," and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5*s*. I, therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Was it intended that the £100 should, if the conditions were fulfilled, be paid? The advertisement says that £1,000 is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that £100 would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise £100 to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world,— that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate, — offers to receive offers, — offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s, judgment in Spencer *v.* Harding, *supra*. "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself, says Willes, J., the

person who was to hold the *vinculum juris* on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law — I say nothing about the laws of other countries — to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L. J., in Harris's Case, Law Rep. 7 Ch. 587, and the very instructive judgment of Lord Blackburn, in Brogden *v.* Metropolitan Ry. Co., *supra*, in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character

of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common-sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

A further argument for the defendants was that this was a *nudum pactum*, — that there was no consideration for the promise, — that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball. Now, I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to Victors *v.* Davies, 12 M. & W. 758, and Serjeant Manning's note to Fisher *v.* Pyne, 1 M. & G. 265, which everybody ought to read who wishes to embark in

this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to the alleged want of consideration. The definition of "consideration" given in Selwyn's Nisi Prius, 8th ed., p. 47, which is cited and adopted by Tindal, C. J., in the case of Laythoarp *v.* Bryant, 3 Scott, 238, 250, is this: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant." Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all, — that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

Then we were pressed with Gerhard *v.* Bates, *supra*. In Gerhard *v.* Bates, which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendant. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me

Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public, — a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have £100, it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you £5," and he uses it, there is ample consideration for the promise.

A. L. SMITH, L. J. The first point in this case is, whether the defendants' advertisement which appeared in the "Pall Mall Gazette" was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming there was good consideration to uphold that promise, or whether it was only a puff from which no promise could be implied, or, as put by Mr. Finlay, a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy. Or, as I might put it in the words of Lord Campbell in Denton *v.* Great Northern Ry. Co., *supra*, whether this advertisement was mere waste paper. That is the first matter to be determined. It seems to me that this advertisement reads as follows: "£100 reward will be paid by the Carbolic Smoke Ball Company to any person who after having used the ball three times daily for two weeks according to the printed directions supplied with such ball contracts the increasing epidemic influenza, colds, or any diseases caused by taking

cold. The ball will last a family several months, and can be refilled at a cost of 5*s*." If I may paraphrase it, it means this: "If you" — that is, one of the public as yet not ascertained, but who, as Lindley and Bowen, L.JJ., have pointed out, will be ascertained by the performing the condition — " will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay you £100 if you contract the influenza within the period mentioned in the advertisement." Now, is there not a request there? It comes to this: "In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you £100." It must not be forgotten that this advertisement states that as security for what is being offered, and as proof of the sincerity of the offer, £1,000 is actually lodged at the bank wherewith to satisfy any possible demands which might be made in the event of the conditions contained therein being fulfilled and a person catching the epidemic so as to entitle him to the £100. How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendants had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise. The defendants have contended that it was a promise in honor or an agreement or a contract in honor, — whatever that may mean. I understand that if there is no consideration for a promise, it may be a promise in honor, or, as we should call it, a promise without consideration and *nudum pactum*; but if anything else is meant, I do not understand it. I do not understand what a bargain or a promise or an agreement in honor is unless it is one on which an action cannot be brought because it is *nudum pactum*, and about *nudum pactum* I will say a word in a moment.

In my judgment, therefore, this first point fails, and this was an offer intended to be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay.

In the next place, it was said that the promise was too wide, because there is no limit of time within which the person has to catch the epidemic. There are three possible limits of time to this contract. The first is, catching the epidemic during its continuance; the second is, catching the influenza during the time you are using the ball; the third is, catching the influenza within a reasonable time after the expiration of the two weeks during which you have used the ball three times daily. It is not necessary to say which is the correct construction of this contract, for no question arises thereon. Whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account.

Then it was argued that if the advertisement constituted an offer which might culminate in a contract if it was accepted, and its conditions performed, yet it was not accepted by the plaintiff in the manner contemplated, and that the offer contemplated was such that notice of the acceptance had to be given by the party using the carbolic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is, that there is no such clause in the advertisement, and that, in my judgment, no such clause can be read into it; and I entirely agree with what has fallen from my brothers, that this is one of those cases in which a performance of the condition by using these smoke balls for two weeks three times a day is an acceptance of the offer.

It was then said there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained, from the time of Williams *v.* Carwardine, *supra*, and before that, down to the present day. I have nothing to add to what

has been said on that subject, except that a person becomes a *persona designata* and able to sue, when he performs the conditions mentioned in the advertisement.

Lastly, it was said that there was no consideration, and that it was *nudum pactum*. There are two considerations here. One is the consideration of the inconvenience of having to use this carbolic smoke ball for two weeks three times a day; and the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's user of them. There is ample consideration to support this promise. I have only to add that as regards the policy and the wagering points, in my judgment, there is nothing in either of them.

Appeal dismissed.

Solicitors: *J. Banks Pittman; Field & Roscoe.*

STAMPER *v.* TEMPLE ET AL.

Supreme Court of Tennessee, 1845.

[*Reported in* 6 *Humphreys*, 113.]

ASSUMPSIT. Verdict and judgment for plaintiffs. The facts appear in the opinion.[1]

Turney, for the plaintiff in error.

Venable, for the defendants in error.

By Court, TURLEY, J. This is an action brought by Lassater and Temple against Stamper to recover the sum of two hundred dollars, which they allege is due to them as a reward for arresting Granville B. and Alfred D. Alexander, charged with murdering the son of Stamper.

The bill of exceptions discloses the following state of facts: Some time in the month of September, 1843, the son of Stamper was killed, and himself severely wounded by the two Alexanders. On the evening after the unfor-

[1] The reporter's statement is omitted.

tunate affray, there were several persons at Stamper's house, — he was lying on a bed laboring under great bodily pain from his wounds, and great mental anguish for the loss of his son, who was at the time a corpse in his house, his wife and daughters half distracted. The subject of arresting the Alexanders was spoken of. Stamper said that he did not expect they would be taken that night; that he would put out a reward ahead of them; that he got up and went into the yard, where most of the company were assembled, and observed that he would give a reward of two hundred dollars to any person who would apprehend the Alexanders. To this remark one of the company observed, "Mr. Stamper, I don't want your money;" to which Stamper replied, "Gentlemen, I did not mean it for you." This is all the proof as to the reward for the arrest being offered by Stamper.

Joseph Newman, the sheriff of the county, deposes, that on the evening of a day in September, 1843, he received a message from Stamper informing him that his son had been murdered and himself severely wounded, and requesting him to come immediately to his house. Witness having just returned from Nashville, and being much fatigued, declined going, but sent his deputy, Jonathan Lassater, one of the plaintiffs, who, on the next morning, delivered to him the bodies of the two Alexanders, whom he had arrested without process.

This was all the testimony in the case. The court charged the jury, "that to entitle the plaintiffs to recover against the defendant, he must have made himself liable to them by contract. If the Alexanders murdered his son and fled, and were arrested by the plaintiffs, the defendant, in the absence of contract to that effect, would not be bound to pay them any reward. If the Alexanders killed defendant's son and fled, and upon that defendant offered a reward of two hundred dollars to any person who would arrest them, saying, at the same time, that he did not make his proposition to any person who was present, and the

plaintiffs were present, they would not be entitled to a recovery; that if the defendant offered a reward of two hundred dollars to any person who would arrest the Alexanders, and the plaintiffs, after the offering the reward by the defendant, but before they knew that it had been offered, arrested the Alexanders for the murder, the fact that they were at the time ignorant that the reward had been offered, would be no ground of defence against a suit brought for its recovery."

In this charge the whole court agree that there is error. The judge, in the first place, charged the jury, that there must be a contract of reward to be paid before a suit could be maintained for the recovery of the reward. To make a good contract there must be an *aggregatio mentium*, — an agreement on the one part to give, and on the other to receive. How could there be such an agreement if the plaintiffs in this case made the arrest in ignorance that a reward had been offered? The arrest would have been made not for the reward, but in discharge of the public duty.

But there are other objections arising out of the proof of higher character than this error in the charge of the judge. We do not think that the proof establishes the fact that a reward of two hundred dollars was actually offered.

It appears that the defendant and his family were in deep affliction at the loss of his son, that he himself was laboring under the effect of severe wounds received from the same persons who had killed his son; that when the arresting of the persons who had perpetrated the outrage was spoken of, he observed that he would give two hundred dollars to have them arrested. But to a remark of one of the company that he did not want any of his money, he said he did not intend it for them. Whom did he intend it for, then? for others who were not present? How did he suppose they were to know it? He made no public offer — he authorized no one to make it for him. We are constrained to believe that what is called an offered reward

of two hundred dollars was nothing but a strong expression of feelings of anxiety for the arrest of those who had so severely injured him, and this greatly increased by the distracted state of his own mind, and that of his family: as we frequently hear persons exclaim, Oh! I would give a thousand dollars if such an event were to happen, or *vice versa*. No contract can be made out of such expressions; they are evidence of strong excitement, but not of a contracting intention.

But furthermore, Jonathan Lassater, in making the arrest, was in the line of his duty; he was deputy sheriff of the county where the outrage had been committed; he had been sent by the principal sheriff to attend to it in his stead. Under such circumstances a majority of the court hold that as a matter of public policy, he would not have been entitled to claim the reward had it been offered.

Upon the whole view of the case, then, we reverse the judgment of the court, and remand the case for a new trial.[1]

COTTAGE STREET METHODIST EPISCOPAL CHURCH *v.* EDWARD KENDALL, Executor.

Supreme Judicial Court of Massachusetts, 1877.

[*Reported in* 121 *Mass.* 528.]

CONTRACT to recover the amount of a subscription by Amos R. Rollins, the defendant's testator, towards the erection of a chapel for the plaintiff. Trial in the Superior

[1] On rewards see Williams *v.* Carwardine, 4 B. & Ad. 621 (1833); Loring *v.* Boston, 7 Met. 409 (1844); Pool *v.* Boston, 5 Cush. 219 (1849); Fitch *v.* Snedaker, 38 N. Y. 248 (1868); Howland *v.* Lounds, 51 N. Y. 604 (1873); Shuey *v.* United States, 92 U. S. 73 (1875); Hayden *v.* Souger, 56 Ind. 42 (1877); Hewitt *v.* Anderson, 56 Cal. 476 (1880); McCandless *v.* Allegheny Bessemer Steel Co., 152 Pa. 139 (1893). Many cases are collected in a note in 26 Am. Rep. 5–10.

Court, without a jury, before Pitman, J., who allowed the following bill of exceptions:

"It appeared that said church was organized in the manner shown by the records, and the trustees of the same chosen April 5, 1871, and said Rollins was chosen the treasurer of said trustees, and said church was reorganized, on account of some flaw in the organization, in August, 1872, with the same board of trustees, — all of which appears in said records," but is not material to be particularly stated.

"In April, 1871, after said organization, an informal meeting of persons interested in building a chapel for said church was held at the house of said Rollins, of which certain persons acted as chairman and secretary. A subscription was thereupon opened to see how much could be raised for that purpose. Various persons announced their willingness to give different sums, and the secretary, at the time, in their presence and with their knowledge, wrote down their names, and the amounts so promised by each opposite thereto. Rollins was one of those so promising, and said that his name might be put down for $500. He afterwards, within a short time, acknowledged and ratified such subscription orally. Being treasurer of the trustees, he also received some payments from individuals on account of such subscriptions.

"Some months after this meeting, and long before August, 1872, some trouble arose between Rollins and the other members, and Rollins, at their request, withdrew from the office of treasurer, and thereafterwards voluntarily ceased all participation in the affairs of the society, except that he remained one of its trustees until the end of the year for which he was chosen, and was present at the reorganization in August, 1872. No demand was made on him for payment. He died in March, 1873.

"The chapel was built before Rollins's death, by and for the use of the plaintiff. There was conflicting evidence as to whether anything was done, or any liability incurred

or obligation assumed, by the plaintiff in reliance upon the subscription of Rollins.

"The defendant contended that nothing was done, nor any liability or obligation incurred or assumed, by the plaintiff in reliance upon the subscription of Rollins; that there was no consideration for the promise, and that the plaintiff was not the party to maintain this action; and asked the court so to rule.

"But the court, without passing upon the question of fact, whether the plaintiff, relying upon the subscription of Rollins, had done anything or incurred or assumed any liability or obligation, ruled that upon the facts above stated there was a sufficient consideration for the promise of Rollins, and that the plaintiff was the proper party to bring the action, and accordingly found for the plaintiff. The defendant excepts to these rulings."

J. W. Hammond, for the defendant.

D. F. Crane, for the plaintiff.

GRAY, C. J. The performance of gratuitous promises depends wholly upon the good will which prompted them, and will not be enforced by the law. The general rule is that, in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. Exchange Bank *v.* Rice, 107 Mass. 37. To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble, or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made.

A promise to pay money to promote the objects for which a corporation is established falls within the general rule. In every case in which this court has sustained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown, either by express vote or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act, — such as advancing or expending money, or erecting a building,

in accordance with the terms of the contract, and upon the faith of the defendant's promise. Fisher *v.* Ellis, 3 Pick. 322; Bryant *v.* Goodnow, 5 Pick. 228; Amherst Academy *v.* Cowls, 6 Pick. 427; Williams College *v.* Danforth, 12 Pick. 541; Thompson *v.* Page, 1 Met. 565; Ives *v.* Sterling, 6 Met. 310; Watkins *v.* Eames, 9 Cush. 537; Mirick *v.* French, 2 Gray, 420; Ladies' Collegiate Institute *v.* French, 16 Gray, 196; Athol Music Hall Co. *v.* Carey, 116 Mass. 471. To the latter class belongs Hanson Trustees *v.* Stetson, 5 Pick. 506, in which the subscriptions were to increase a ministerial fund, and the court "found it a fact agreed" (whether in the case stated, or by counsel at the argument, does not clearly appear by the report) "that in consequence of the accumulation of the fund by these means, the great purpose, viz., the settlement of a minister, has been effected."

Where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing, upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of an offer of reward. Freeman *v.* Boston, 5 Met. 56; Loring *v.* Boston, 7 Met. 409; Carr *v.* National Security Bank, 107 Mass. 45, 48.

The suggestion in 5 Pick. 508, substantially repeated in 6 Met. 316, and in 9 Cush. 539, that "it is a sufficient consideration, that others were led to subscribe by the very subscription of the defendant," was in each case but *obiter dictum*, and appears to us to be inconsistent with elementary principles. Similar promises of third persons to plaintiff may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the plaintiff, they constitute no legal consideration for the defendant's promise to him.

The facts in the present case show no benefit to the

defendant, and no vote or contract by the plaintiff; and, although it appears that the chapel was afterwards built by the plaintiff, it is expressly stated in the bill of exceptions that the learned judge who presided at the trial did not pass upon the question of fact whether the plaintiff had, in reliance upon the promise sued on, done anything or incurred or assumed any liability or obligation. It does not therefore appear that there was any legal consideration for the promise upon which this action is brought.

Exceptions sustained.

GRAND LODGE OF THE INDEPENDENT ORDER OF GOOD TEMPLARS OF THE STATE OF CALIFORNIA, Appellant, *v.* ELMA C. FARNHAM, EXECUTRIX, ETC., OF S. C. FARNHAM, DECEASED, Respondent.

Supreme Court Commission and Supreme Court of California, 1886.

[*Reported in* 70 *Cal.* 158.]

APPEAL from a judgment of the Superior Court of Solano County.

The facts are stated in the opinion.

George A. Lamont, and *Joel A. Harvey*, for appellant.

S. G. Hilborn and *F. W. Hall*, for respondent.

BELCHER, C. C. The court below sustained a demurrer to the complaint, and whether it erred in so doing or not, is the only question presented for decision.

The facts as stated in the complaint are substantially as follows:

The plaintiff was the owner of certain real property in Solano County, on which was erected the Good Templar's Home for Orphans. At the time of filing the complaint, and for a long time prior thereto, the home was conducted and managed by the plaintiff. In 1833 it was deemed

important to erect an addition to the home, so that a greater number of orphans could be taken care of thereat; and to raise money for that purpose, subscription papers were circulated and subscriptions solicited by an agent employed by the plaintiff.

In September, 1833, S. C. Farnham, the defendant's testator, subscribed one of these papers and placed opposite his name as the amount of his subscription one thousand dollars.

On the first day of December, 1833, Farnham died, leaving a will. The will was admitted to probate, and notice to creditors published; and then plaintiff presented to the executrix its claim for the one thousand dollars subscription, and the claim was rejected. In October, 1833, the agent employed to get subscriptions reported to the plaintiff the amount of money collected and then on hand, and the amount subscribed and unpaid, of which the larger part was the one thousand dollars subscribed by Farnham. The plaintiff afterwards, but it does not appear when, commenced to erect an addition to the home, and was still prosecuting the work when this action was commenced.

The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The general rule is, that a promise to pay a subscription like that declared on here is a mere offer, which may be revoked at any time before it is accepted by the promisee. And an acceptance can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money is expended on the faith of the promise.

If the promisor dies before his offer is accepted, it is thereby revoked, and cannot afterwards, by any act showing acceptance, be made good as against his estate. Pratt *v.* Trustees, 93 Ill. 475; Beach *v.* First M. E. Church, 96 Ill. 179; Phipps *v.* Jones, 20 Pa. St. 260; Helfenstein's Estate, 77 Pa. St. 331; Cottage Street Church *v.* Kendall, 121 Mass. 528.

The rule is otherwise where subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such case, as between the subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay. George *v.* Harris, 4 N. H. 533; Curry *v.* Rogers, 21 N. H. 247; 1 Wharton on Contracts, p. 719.

Here it is not alleged in the complaint that the plaintiff entered into any contract, incurred any liability, or expended any money for the erection of an addition to the home for orphans before the death of Farnham. His subscription was therefore withdrawn by his death, and was not a valid claim against his estate.

Counsel for appellant cite Christian College *v.* Hendley, 49 Cal. 347; but that case is not in conflict with what has been said. And besides, the matter quoted from Watkins *v.* Evans, 9 Cush. 539, has since been held by the same court, in Cottage Street Church *v.* Kendall, *supra*, to be *obiter dictum*, and inconsistent with elementary principles.

We think the demurrer was properly sustained, and the judgment should be affirmed.

SEARLES, C., and FOOTE, C., concurred.

THE COURT. — For the reasons given in the foregoing opinion, the judgment is affirmed.

THE PRESBYTERIAN CHURCH OF ALBANY, Appellant, *v.* THOMAS C. COOPER ET AL., as ADMINISTRATORS, ETC., Respondents.

Court of Appeals of New York, 1889.

[*Reported in* 112 *N. Y.* 517.]

APPEAL from order of the general term of the Supreme Court in the third judicial department, made the first Tuesday of May, 1887, which reversed a judgment in favor

of plaintiff, entered upon the report of a referee, and ordered a new trial. (Reported below, 45 Hun, 453.)

This was a reference under the statute of a disputed claim against the estate of Thomas P. Crook, defendant's intestate. The claim arose under a subscription paper, of which the following is a copy: —

"We, the undersigned, hereby severally promise and agree to, and with the trustees of the First Presbyterian Church in this city of Albany, in consideration of one dollar to each of us in hand paid and the agreements of each other in this contract contained, to pay on or before three years from the date hereof to said trustees the sum set opposite to our respective names; but upon the express condition, and not otherwise, that the sum of $45,000 in the aggregate shall be subscribed and paid in for the purpose hereinafter stated; and if within one year from this date said sum shall not be subscribed or paid in for such purpose, then this agreement to be null and of no effect. The purpose of this subscription is to pay off the mortgage debt of $45,000, now a lien upon the church edifice of said church, and the subscription or contribution for that purpose must equal that sum in the aggregate to make this agreement binding.

"Dated May 18, 1884."

The defendant's intestate made two subscriptions to this paper, one of $5,000 and the other of $500. He paid upon the subscription $2,000. The claim was for the balance.

Matthew Hale, for appellant. There may be a valid waiver without the element of estoppel. Prentice *v.* K. L. Ins. Co., 77 N. Y. 483, 489; Goodwin *v.* M. M. L. Ins. Co., 73 id. 480; Titus *v.* G. F. Ins. Co., 81 id. 410, 419. Whenever there is a condition precedent for a party's benefit, he may waive it; and such waiver does not require a new consideration. Conkling *v.* King, 10 N. Y. 440, 446; Clark *v.* Dales, 20 Barb. 52, 64; Goodwin *v.* M. M.

L. Ins. Co., 73 N. Y. 495. A condition precedent is waived by proceeding to fulfil the contract without insisting upon its performance. Conkling *v.* King, 10 N. Y. 442; Goit *v.* N. P. Ins. Co., 25 Barb. 189, 191, 192; Avery *v.* Wilson, 81 N. Y. 341; Nichols *v.* Mace, 94 id. 160, 165. A party may waive the benefit of any condition or provision made in his behalf. Conkling *v.* King, 10 N. Y. 442; Goit *v.* N. P. Ins. Co., 25 Barb. 189, 191, 192; Baker *v.* Braman, 6 Hill, 47, 48; People *v.* Van Rensselaer, 9 N. Y. 291, 333. The case shows many acts on the part of the plaintiff and its officers, and the other subscribers, which may be fairly said to have been done in consequence of Mr. Crook's waiving the strict performance of the conditions of the agreement, if they were not performed. Hutchins *v.* Smith, 46 Barb. 235; Dutch Church *v.* Brown, 17 How. Pr. 287. The subscription was a valid and binding obligation. 1 Comst. 581; Barnes *v.* Perine, 12 N. Y. 18, 27; Parsons on Cont. 452; Miller *v.* Ballard, 46 Ill. 377; Presby. Society *v.* Beach, 74 N. Y. 72; Collegiate Ins. *v.* Smith, 36 Barb. 576; T. C. A. *v.* Nelson, 24 Vt. 189; Lathrop *v.* Knapp, 27 Wis. 214; Trustees *v.* Haskell, 73 Me. 140; U. P. Church *v.* Bayard, 60 Iowa, 237; Roberts *v.* Cobb, 103 N. Y. 600. The conditions of the subscription were performed. Crawford *v.* Collins, 45 Barb. 269; Lucas *v.* Beale, 4 Eng. Law and Eq. 358; Lauferty *v.* Wheeler, 11 Abb. N. C. 220, 224; Gay *v.* Seibold, 97 N. Y. 472, 476; T. & B. R. R. Co. *v.* Warren, 18 Barb. 310; N. H. Co. *v.* Hursee, 79 N. Y., 454; Kelner *v.* Baxter, L. R. 2 C. P. 174.

Walter E. Ward, for respondent. The subscriptions are absolutely void for want of consideration. Stewart *v.* Hamilton College, 2 Denio, 403; Hamilton College *v.* Stewart, 1 N. Y. 581; Stoddard *v.* Cleveland, 4 How. Pr. 150; Hammond *v.* Shepard, 29 id. 190; 1 Parsons, 452–454; Pratt *v.* Trustees, 34 Am. Rep. 187; 93 Ill. 475; Beach *v.* M. E. Church, 96 id. 179; University *v.* Livingston, 57 Iowa, 307; C. S. M. E. Church *v.* Kendall, 121

Mass. 528; L. Academy *v.* Davis, 11 Mass. 113, 116, 117. The subscription of one subscriber to a subscription paper is not a valid consideration for the subscription of another. 1 Parsons, 452–454; Hamilton College Case, 1 N. Y. 581; Limerick Academy *v.* Davis, 11 Mass. 113, 116, 117; Barnes *v.* Perine, 12 N. Y. 18, 30; 1 id. 581, 582; 2 Denio, 217; Pratt *v.* Trustees, 93 Ill. 475; Beach *v.* F. M. E. Church, 96 id. 179; C. S. M. E. Church *v.* Kendall, 121 Mass. 528. The conditions of the agreement were not fulfilled, invalid subscriptions having been obtained and included in making up the amount. N. Y. E. Co. *v.* De Wolf, 31 N. Y. 273, 281; Hirschl on Fraternities, § 3910. In order to constitute an estoppel, or a waiver of objections, there must be some act or omission which has misled another acting upon it in good faith and exercising reasonable care. Boardman *v.* L. S. & M. S. R. Co., 84 N. Y. 157, 182. If the element of fraud or injury is wanting, there is no estoppel. N. M. L. Ins. Co. *v.* Amerman, 10 N. E. Rep. 225; 119 Ill. 329; 35 Albany Law Jour. 364–366. A party does not waive an objection founded upon a fact of which he is ignorant. Newbury *v.* Furnival, 56 N. Y. 638.

Andrews, J. It is, we think, an insuperable objection to the maintenance of this action, that there was no valid consideration to uphold the subscription of the defendant's intestate. It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience. By the terms of the subscription paper, the subscribers promise and agree to and with the trustees of the First Presbyterian Church of Albany, to pay to said trustees within three years from

its date, the sums severally subscribed by them, for the purpose of paying off "the mortgage-debt of $45,000 on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration, viz., "in consideration of one dollar to each of us (subscribers) in hand paid and the agreement of each other in this contract contained." It was shown that the one dollar recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The recital of a consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration which, on its face, is insufficient to support a promise, give it any validity, although the fact recited may be true.

It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others; and this, although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the chancellor as expressed in Hamilton College *v.* Stewart, when it was before the Court of Errors (2 Den. 417), and *dicta* of judges will be found to the same effect in other cases. Trustees, etc. *v.* Stetson, 5 Pick. 508; Watkins *v.* Eames, 9 Cush. 537. But the doctrine of the chancellor, as we understand, was overruled when the Hamilton College case came before this court (1 N. Y. 581), as have been also the *dicta* in the Massachusetts cases, by the court in that State, in the recent case of Cottage Street Methodist Episcopal Church *v.* Kendall, 121 Mass. 528. The doctrine seems to us unsound in principle. It pro-

ceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors, and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant.

In the disposition of this case we must, therefore, reject the consideration recited in the subscription paper as ground for supporting the promise of the defendant's intestate, the money consideration, because it had no basis in fact, and the mutual promise between the subscribers, because there is no privity of contract between the plaintiff and the promisors. Some consideration must, therefore, be found other than that expressly stated in the subscription paper, in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff, during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfil the condition upon which the liability of the subscribers depended. There is no doubt that labor and services, rendered by one party at the request of another, constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees did, or undertook to do anything, upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals, interested in promoting the general object in view.

Leaving out of the subscription paper the affirmative

statement of the consideration (which, for reasons stated, may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in Hamilton College *v.* Stewart, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage, that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment, in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money, paid on subscriptions, upon the mortgage debt, did not constitute a consideration for the promise of the defendant's intestate. We are unable to distinguish this case in principle from Hamilton College *v.* Stewart, 1 N. Y. 581. There is nothing that can be urged to sustain this subscription that could not, with equal force, have been urged to sustain the subscription in that case. In both the promise was to the trustees of the respective corporations. In this case the defendant had paid part of his subscription and resisted the balance. In both, part of the subscription had been collected and applied by the trustees to the purpose specified. In the Hamilton College case (which, in that respect, is unlike the present one) it appears that the trustees had incurred expense in employ-

ing agents to procure subscriptions to make up the required amount, and it was shown, also, that professors had been employed upon the strength of the fund subscribed. That case has not been overruled, but has been frequently cited with approval in the courts of this and other States. The cases of Barnes *v.* Perine, 12 N. Y. 18, and Roberts *v.* Cobb, 103 id. 600, are not in conflict with that decision. There is, we suppose, no doubt that a subscription invalid at the time, for want of consideration, may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as was held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor. Judge Allen, in his opinion in Barnes *v.* Perine, said, "the request and promise were, to every legal effect, simultaneous," and he expressly disclaims any intention to interfere with the decision in the Hamilton College case. In the present case it was shown that individual trustees were active in procuring subscriptions. But, as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook; they were co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in which he was deeply interested, and whose interest was manifested up to the very time of his death, is thwarted by the conclusion we

have reached. But we think there is no alternative, and that the order should be affirmed.

All concur.

Order affirmed and judgment accordingly.[1]

THE EDGEWARE HIGHWAY BOARD *v.* THE HARROW DISTRICT GAS COMPANY.

Queen's Bench, 1874.

[*Reported in L. R.* 10 *Q. B.* 92.]

DECLARATION that certain persons formed themselves into a gas company under the name of the Harrow Gaslight and Coke Company, Limited, for the purpose of supplying certain places with gas, and afterwards it was agreed between the plaintiffs and the company that, if the plaintiffs would give to the company their license to open a certain public highway, the same being within the jurisdiction and management of, and vested in, the plaintiffs as the Edgeware Highway Board, the company would make good the surface of the road which might be disturbed or damaged thereby, and would pay to the plaintiffs 1*s.* per yard of the highway so opened. That, by the Harrow Gas Act, 1873, it was enacted that the limited company should be dissolved and the subscribers to the undertaking of the limited company should be and were united into a company for the purpose thereinafter mentioned, and should be incorporated by the name of the Harrow District Gas Company, and by that name should be a body corporate, with power to purchase and hold land. That, except by the act otherwise specially provided, all contracts, bonds, and agreements entered into by the limited company, or by any other person to whose

[1] Compare University of Des Moines *v.* Livingston, 57 Iowa, 307 (1881), s. c., at a later stage, 65 Iowa, 202 (1884); Johnson *v.* Otterbein University, 41 Ohio St. 527 (1885); Twenty-Third St. Baptist Church *v.* Cornwall, 117 N. Y. 601 (1890).

rights and liabilities they had succeeded, should be of as full effect against or in favor of the incorporated company (being the defendants) and might be enforced as fully and effectually as if, instead of the limited company, the incorporated company had been a party thereto, and that the defendants should in all respects be subject to and should discharge all obligations and liabilities to which the limited company, before the passing of this act, were subject. That the agreement between the plaintiffs and the limited company was a contract binding and of as full force against the defendants as if they had been a party thereto by the force and operation of the act. And that after such license was given by the plaintiffs, the highway was opened under such license for 1,476 superficial yards, whereby the highway became and was greatly disturbed and damaged. Averment, that all conditions precedent had been performed. Breach, that neither the limited company nor the defendants did make good the surface of the highway so disturbed and damaged, nor pay to the plaintiffs the sum of 1*s.* per yard in respect of the 1,476 yards so opened, whereby the plaintiffs had been and were greatly damnified and aggrieved, and had been put to great expense in making good the surface of the highway.

Demurrer and joinder in demurrer.[1]

Baylis (*Daniel* with him), for the plaintiffs. It will be said on the other side that the Highway Board have no power to prevent the breaking up of the road, and therefore that there is no consideration for the agreement. The license to open the highway having been given to the defendants, and they having acted on it, it does not lie in the mouth of the defendants to say that the plaintiffs have no power to give the license. Bird *v.* Higginson.[2] There is ample con-

[1] There was a second count for money due to the defendants for the license given to the plaintiffs to open the surface of the highway.

Plea that the causes of action in the second count arise in respect of the identical contract alleged in the first count.

Demurrer to the plea and joinder.

[2] 6 A. & E. 824.

sideration for the agreement; the adequacy of consideration is immaterial. Dutchman *v.* Tooth.[1] The plaintiffs are a Highway Board constituted under s. 5 of 25 & 26 Vict. c. 61, and they have the same duties and the same powers given them by s. 11 as a surveyor of highways has under 5 & 6 Wm. 4, c. 50. By s. 17 they are to maintain and keep in repair the highways, and ss. 18 & 19 point out the proceedings to be taken when a road is out of repair. By s. 72 of 5 & 6 Wm. 4, c. 50, a penalty is imposed on all persons who shall wilfully destroy or injure the surface of any highway. If the defendants had, without a license, opened the surface of the highway, the plaintiffs would have had to repair it, and they could have proceeded against the defendants for penalties, and so have prevented them from opening the highway. There is, therefore, a sufficient consideration for the license. Secondly, the agreement is not unlawful.

[BLACKBURN, J. On that point we will hear the other side.]

Philbrick, Q. C. (*Fitzgerald* with him), for the defendants. There is no consideration for the agreement set out in the declaration. No part of the soil of the highway is vested in the Highway Board as surveyors, neither could any action lie against them for damages resulting from an accident caused by the non-repair of a highway. Young *v.* Davis.[2] Under ss. 11 & 17 of 25 & 26 Vict. c. 61, the plaintiffs have certain duties and powers conferred on them. They are bound to repair the highway and maintain it in repair, but they have no power whatever to authorize the opening of the surface of the highway. Secondly, the agreement is illegal. It is an agreement to commit a nuisance on the highway. To obstruct a highway by breaking up the surface is an indictable offence: Reg. *v.* Longton Gas Company;[3] and is therefore illegal.

Baylis was not heard in reply.

[1] 5 Bing. N. C. 577.
[2] 2 H. & C. 197; 31 L. J. (Ex.)
[3] 2 E. & E. 651; 29 L. J. (M. C.)

BLACKBURN, J. I think that our judgment ought to be for the plaintiffs. They are a Highway Board, performing the same duties and having the same powers as a surveyor would have if elected by the inhabitants of a parish under 5 & 6 Wm. 4, c. 50. The surveyor is the officer of the parish who *de facto* has the control of the highways and the right to prevent persons from doing things injurious to the highway. If any person attempted to open the soil of the highway, the surveyor would be the proper person to stop him from breaking up the road, and it would be incumbent on the surveyor to have the surface made good. Under these circumstances the plaintiffs, as surveyors of highways, are applied to by the defendants, who are a gas company, for permission to break the surface of the highway in order to lay down gas pipes. In answer to this application, the plaintiffs say they will grant a license on certain terms, and these terms are stated in the record to be that the company shall make good the surface of the road which would be disturbed or damaged, and shall pay to the plaintiffs 1*s*. per yard for the highway opened. I am of opinion that a sufficient consideration is shown. A consideration is sufficient if there be a benefit to the defendant or a detriment to the plaintiff. The plaintiffs have the right to say to the defendants that they are not to meddle with the surface of the highway; and if the defendants did meddle with the highway without the leave of the plaintiffs, they would be liable to a penalty under s. 72 of 5 & 6 Wm. 4, c. 50. I do not think that the license to open the highway is necessarily a license to commit an indictable offence. It is quite possible to open the highway within the terms of the agreement without creating a nuisance. It is true that the public cannot use the spot opened, and if the defendants opened too much of the road at one time it might be a nuisance, but they cannot take the objection that they themselves by their own fault might create a nuisance. I am of opinion that there is nothing to show that the bargain is tainted with illegality.

MELLOR, J. I am satisfied that the allegations on the record do not show that necessarily the license is one to commit an indictable offence. Secondly, if certain parties come together, and one, assuming that the other has authority to give a license to open a highway, agrees that, if the license be given, he will restore the road to its original good condition and also pay a certain sum of money, I am of opinion that there is a good consideration for the agreement.

LUSH, J. I am of the same opinion. I must own that from the very first I thought that this was a very clear case. The first objection is that the contract is *nudum pactum* for want of a consideration. The agreement is that if the plaintiffs would give to the defendants their license to open a certain public highway, the defendants would make good the surface of the road, and would pay to the plaintiffs 1*s.* per yard of the highway so opened. Now the 1*s.* per yard to be paid to the plaintiffs is evidently stipulated for to compensate them for the expenses they would incur for any sinking of the road that might take place afterwards, the filling up of which is a duty cast on the plaintiffs as surveyors. It appears to me that there is ample consideration for the agreement. There is both a benefit to the one party and a detriment to the other, — a detriment to the plaintiffs, inasmuch as they are charged with the duty of repairing and maintaining the highway, and would have had to incur costs for this purpose; and a benefit to the defendants, who could not have opened the highway without the consent of the plaintiffs, and who forbore to exercise their power of preventing the defendants from opening the highway. Secondly, it was said that the agreement is illegal, that the plaintiffs are authorizing an indictable offence. But there is nothing to show that this is so, and even if it were, as at present advised, I doubt if the defendants could set up as a defence that the contract is illegal. *Judgment for the plaintiffs.*

Attorneys for plaintiffs: *Tilley & Liggens.*

Attorney for defendants: *Weightman.*

BIXBY *v.* MOOR AND ANOTHER.

Supreme Judicial Court of New Hampshire, 1871.

[*Reported in* 51 *N. H.* 402.]

ASSUMPSIT, by Joseph C. Bixby against Moor & Gage, to recover pay for services rendered by the plaintiff for the defendants from October 1, 1861, to December 20, 1863. The following facts were agreed: —

The defendants kept a billiard saloon, and bar for the sale of intoxicating liquor, in Lowell, Mass. The billiard saloon was licensed by the city authorities of Lowell, but the sale of liquor was illegal. The plaintiff was employed by the defendants to work generally in and about the saloon, but there was no special agreement that he should or should not sell liquor, or as to what particular duty he should do; but he was accustomed to work generally in and about the saloon, taking care of the room, building the fires, taking care of the billiard-table, tending at the bar, and waiting upon customers. He was accustomed to open the saloon in the morning, waiting upon the customers, and in the absence of the defendants had the whole charge of the business. The plaintiff, at the time he entered into the service of the defendants, knew what business was carried on there. The defendants contended, upon the foregoing facts, that the plaintiff was not entitled to recover. It was agreed that judgment should be ordered according to the opinion of the court upon the foregoing facts, reserving to either party the right to a trial by jury.

G. Y. Sawyer & Sawyer, Jr., for the plaintiff.

I. Upon the facts stated, the court cannot find that there was a contract for the services of the plaintiff in an illegal employment, in whole or in part. The jury would not be warranted in so finding.

II. But if such contract should be found, that is not the case of an entire contract for the plaintiff's services at a stipulated price. The agreement is merely that implied in law, — that the defendants should pay what the services were reasonably worth. If the services had been wholly rendered in a legal employment, the price to be paid could only be ascertained by the verdict of a jury upon a *quantum meruit*. There is nothing in the agreement "mingling and binding together" the legal and illegal so that they cannot be separated. Bell, C. J., in Crowell *v.* Hopkinton, 45 N. H. 13. The mode by which the whole price must be determined, in case the entire contract was for a legal service, — to wit, by the verdict of a jury, — is here to be applied to determine what part of the services was rendered in the legal employment. The inquiry before the jury in this case would be, How much ought the plaintiff to recover for his services when lawfully employed? there being no agreement between the parties as to the price per day, or otherwise, "to mingle and bind together" the legal and illegal services. Walker *v.* Lovell, 28 N. H. 138; Carleton *v.* Woods, 28 N. H. 290.

Morrison & Stanley, for defendants.

Smith, J. The plaintiff would have been entitled to the reasonable worth of his entire services, if no part of them had been rendered in an illegal business. It must be conceded that he cannot recover for his services in the sale of liquor; but he claims that a portion of his services was rendered in a legal employment, and that he can recover the value of that portion. The defendants contend that no part of the services was rendered in a legal business, arguing that the keeping of the billiard-tables was so far connected with and in furtherance of the liquor traffic, that it must be regarded as part and parcel of the same, falling under the same legal condemnation. Whether the latter position is well founded would seem to be a question of fact; but it need not be considered here, for we are of

opinion that, even if part of the business was lawful, still the plaintiff cannot recover.

If the consideration for the defendants' promise, to pay the plaintiff a reasonable compensation, was the plaintiff's promise to perform both classes of services, the illegal as well as the legal, it is clear that the defendants' promise could not be enforced. A contract is invalid if any *part* of the consideration on either side is unlawful. See Metcalf on Contracts, 216–219. What the mutual promises were is a question of fact. The parties do not appear to have fully expressed in language the precise nature of the various services to be performed by the plaintiff, nor to have made any verbal bargain as to the mode of payment. In such cases it is sometimes said that "the law implies an agreement" as to the matters omitted to be explicitly stated in the verbal bargain. Strictly speaking, this is inaccurate. The agreement, though not fully expressed in words, is, nevertheless, a genuine agreement of the parties; it is "implied" only in this, that it is to be inferred from the acts or conduct of the parties instead of from their spoken words; "the engagement is signified by conduct instead of words." But acts intended to lead to a certain inference may "express a promise as well as words would have done." The term "tacit contract," suggested by Mr. Austin, describes a genuine agreement of this nature better than the phrase "an implied contract;" for the latter expression is sometimes used to designate legal obligations, which, in fact, are not contracts at all, but are considered so only by a legal fiction for the sake of the remedy. See Austin on Jurisprudence, 3d ed., 1018, 946; Am. Law Review, vol. 5, pp. 11, 12; Metcalf on Contracts, 5, 6, 9, 10, 163, 164; Edinburgh Review, American reprint, vol. 118, p. 239.

The questions arising in this case — What services did the plaintiff agree to perform? was it an entire contract? were there separate contracts, upon separate considerations, as to the legal and the illegal services? — are all

questions of fact depending upon the mutual understanding of the parties; and, if the nature of the agreed facts is such as to allow of a finding either way, it would be proper to submit the questions to a jury. In the present case, however, there is room for but one conclusion, — namely, that the agreement was that the plaintiff, at the defendants' request, should perform all the services which he did in fact perform, and that the defendants, in consideration of the promise to perform (and the performance of) all those services, the illegal as well as the legal, should pay the plaintiff the reasonable worth of the entire services. In other words, the plaintiff made an entire promise to perform both classes of services; this entire promise (and the performance thereof) formed an entire consideration for the defendants' promise to pay; and a part of this indivisible consideration was illegal. Walker *v.* Lovell, 28 N. H. 138, and Carleton *v.* Woods, 28 N. H. 290, cited by the plaintiff, are not in point. In those cases the different articles sold were valued separately in the sale. If the plaintiff had performed a class of services for each of which it is customary to pay a separate price (see, for instance, Robinson *v.* Green, 3 Metcalf, 159), the nature of the various services so performed might afford ground for the conclusion that the parties contemplated a separate payment for each service rendered. But it is not contended that it is customary to pay saloon-tenders separate prices for sweeping, for building fires, for acting as billiard-markers, and for selling liquor.

In accordance with the provisions of the agreed case, unless the plaintiff elects trial by jury, there must be

Judgment for the defendants.[1]

[1] Compare Emery *v.* Kempton, 2 Gray, 257 (1854); Mosher *v.* Griffin, 51 Ill. 184 (1869); Harris *v.* White, 81 N. Y. 532 (1880); Handy *v.* St Paul Globe Pub. Co., 41 Minn. 188 (1889).

TYLER *v.* CARLISLE.

Supreme Judicial Court of Maine, 1887.

[*Reported in* 79 *Me.* 210.]

On exceptions, which were as follows: —

"This was an action of assumpsit, to recover one hundred and fifty dollars, which plaintiff claimed he loaned and delivered to the defendant in money, while defendant was engaged in a game of poker. Defendant claimed that the one hundred and fifty dollars was a poker or gambling debt, and was the amount he was indebted to the plaintiff at the end of the game. The verdict was for the defendant. The presiding judge instructed the jury as follows: —

"That if the lender of money knows that the borrower wants it to gamble with, and lends it to him, with the express understanding and intention that it shall be so used, and it is so used, the debt thereby created is not recoverable. The law will not lend its aid to enforce such a contract. I do not mean to say that the mere belief on the part of the lender that the borrower intends to gamble with the money, or a knowledge, even, that he will so use it, will defeat a recovery. I do not so understand the law. What I mean to say is, that if knowing of the illegal use which the borrower intends to make of it, the lender furnishes the money for the very purpose of enabling the borrower to gamble with it, and it is so used, the debt thereby created cannot be recovered.

"To which instruction the plaintiff excepts, and prays that his exceptions may be allowed."

C. E. Littlefield, for plaintiff.

R. S., sec. 10, furnishes no justification for the ruling complained of.

The necessary implication arising from this statute is that money loaned at the time and place may be recovered. The statutes are not to be extended by construction. They

are to be strictly construed. Abbott *v.* Wood, 22 Maine, 546; Com. & W. & N. R. R., 124 Mass. 563; Cleveland et al. *v.* Norton, 6 Cush. 383.

It has therefore been held that a similar statute did not affect the loan itself, but that the money might be recovered. Peck *v.* Briggs, 3 Denio, 107.

We say that the last clause of the instruction, or the last proposition, is clearly erroneous, that it not only misled the jury, but that a careful analysis demonstrates that it has no legal foundation upon which it can stand.

We think we are able to show that the origin of this language was such as does not justify its application to the case at bar, and has been carried down through the authorities by reason of an incorrect apprehension of the original precedent.

The 68 Maine case relies for authority upon Cannan *v.* Bryce, 3 Barn. & Ald. 179; McKinnell *v.* Robinson, 3 M. & W. 434, and Tracy *v.* Talmage, 14 N. Y. 162.

An examination of the Maine case discloses the fact that the proposition in that case was nothing but a *dictum*, as the court there said, "There is no claim in this case for money lent." The same is true of the 14 N. Y. case, Cannan *v.* Bryce, and McKinnell *v.* Robinson, which were there cited as authority for the language. McKinnell *v.* Robinson cites and expressly relies upon Cannan *v.* Bryce, and a statute of George 3, which goes much farther than our own case.

Now the case of Cannan *v.* Bryce, instead of being against the case at bar, makes a distinction that is decisive against the second proposition.

J. E. Hanley, for the defendant, cited: R. S., c. 125, §§ 2, 10; Franklin Co. *v.* Lewiston Sav. Bank, 68 Me. 47; Flagg *v.* Baldwin, 38 N. J. Eq. [11 Stew.] 219, 48 Am. Rep. 308; Whitesides *v.* Hunt, 97 Ind. 191, 49 Am. Rep. 441; Cunningham *v.* National Bank, Augusta, 71 Ga. 400, 51 Am. Rep. 266.

PETERS, C. J. The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling, at the trial, was that, if the plaintiff let the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered; but otherwise, if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct.

Any different doctrine would, in most instances, be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend, — to the man, and not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts.

In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower, — a union of purpose. The lender must in some manner be a confederate or participator in the borrower's act, be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man. In support of this view many cases might be adduced. A few prominent ones will suffice. Green *v.* Collins, 3 Cliff. 494; Gaylord *v.* Soragen, 32 Vt. 110; Hill *v.* Spear, 50 N. H. 252; Peck *v.* Briggs, 3 Denio, 107; McIntyre *v.* Parks, 3 Met. 207; Banchor *v.* Mansel, 47 Maine, 58. (See 68 Maine, p. 47.)

Nor was the branch of the ruling wrong, that plaintiff, even though a participator, could recover his money back, if it had not been actually used for illegal purposes. In minor offences the *locus pœnitentiæ* continues until the

money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract or the illegal purpose has not been put in operation. The lender can cease his own criminal design and reclaim his money. "The reason is," says Wharton, "the plaintiff's claim is not to enforce, but to repudiate, an illegal contract." Whar. Con. § 354, and cases there cited. The object of the law is to protect the public — not the parties. "It best comports with public policy to arrest the illegal transaction before it is consummated," says the court in Stacy *v.* Foss, 19 Maine, 335; see White *v.* Bank, 22 Pick. 181.

The rule allowing a recovery back does not apply where the lender knows that some infamous crime is to be committed with the means which he furnishes. It applies only where the minor offences are involved.

Exceptions overruled.

DANFORTH, VIRGIN, LIBBEY, FOSTER, and HASKELL, JJ. concurred.

HARVEY AND OTHERS *v.* MERRILL AND ANOTHER.

Supreme Judicial Court of Massachusetts, 1889.

[*Reported in* 150 *Mass.* 1.]

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, AND HOLMES, JJ.

CONTRACT to recover for losses incurred by the plaintiffs, in the purchase and sale of pork on the Chicago Board of Trade for the defendants, and for their commissions as brokers. The case was referred to an auditor, who made a report, which, so far as material, is as follows.

The plaintiffs were commission merchants and brokers, dealing in provisions and grain as members of the Board of Trade in the city of Chicago. The defendants were brokers

in the city of Boston, who forwarded orders for the purchase and sale of pork, upon contracts for future delivery, to the plaintiffs, who entered into contracts of purchase and sale for future delivery in their own name, but for account of the defendants, the defendants promising to pay them a commission for the execution of such orders, and to reimburse them for any expenses or losses which should be incurred in the final settlement. This action is brought to recover for commissions in the execution of such orders, and for the loss, being the difference between the contracts of purchase which the plaintiffs made on behalf of the defendants and the sales of the same quantity of pork for the same account.

The defendants gave the order, and the plaintiffs made the contracts. There was a rapid decline in the market shortly after the contracts for purchases were made, in consequence of which, when the contracts for sales were made, there was a loss of about twenty thousand dollars, which the plaintiffs have paid and have suffered.

It was the custom in such dealings for persons in the situation of the plaintiffs to require a deposit of a margin, unless the person executing the orders was content to rely upon the pecuniary responsibility of the person giving such orders, and there was a customary margin of a dollar a barrel on pork at that time in these transactions made on the Chicago Board of Trade. A draft of one thousand dollars was sent on May 28, 1883, and credited as a margin, and another sum of three thousand dollars as a margin was sent by the defendants about July 2, in response to a request from the plaintiffs for the same.

The principal ground of defence was that these contracts were made upon the mutual understanding that no delivery of the merchandise was intended or expected, but that, by a series of offsetting contracts of sales for future delivery of the same kind of merchandise, settlements were to be made by the payment of the difference in price, according to the state of the market as it should rise or fall, and

that the contracts were merely a device to enable the parties to make, in effect, wagers upon the probable rise or fall in the market, and thus to gamble upon the chance of such advance or decline in prices.

It was well understood by the parties, both plaintiffs and defendants, that, though the contracts in form called for and required an express delivery of the pork purchased and sold, yet the parties intended and contemplated only transactions by formal contracts, which should be set off one against the other, to avoid the necessity of ever receiving or delivering a single barrel of pork, and that the transactions were to be adjusted and settled solely upon those differences which the chances of the rise and fall of the market should create. These contracts were to be executed in Chicago, and were clearly governed by the law of Illinois; and at the time they were made, a statute was there in force, which declared that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, . . . shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." Rev. Sts. of Ill. of 1874, c. 38, § 130.

The terms of these contracts did not give the parties an option to sell or buy at a future time this pork; they were contracts to be fulfilled by the delivery of the pork in a future month; and were not such options as are forbidden by the statute. The auditor based his finding as to the invalidity of the contracts upon the fact, that, though the parties made express contracts for the purchase of several thousand barrels of pork in June and July, to be delivered in August and September, yet it was well understood between the parties that actual deliveries were not to be made, but such deliveries were to be avoided by the device of making equivalent contracts for the sale of an equal

number of barrels of pork deliverable in the same months, and then by making a direct settlement by a set-off of these opposite contracts, and by paying or receiving the difference created by the rise or fall in the market prices. According to the rules of the Board of Trade, and according to the terms of the contracts made, the purchaser could exact the delivery of the article, and he could not be required to settle by an offsetting contract; and a seller could likewise insist upon a delivery and payment of the money, and not be required to settle by an offsetting contract. In a vast majority of the transactions of the Board of Trade, settlement was made by the set-off of opposite contracts; and in every instance such was the mode of dealing between the plaintiffs and the defendants.

The defendants did not deal in these articles of merchandise by the actual receipt and delivery of the same, and never have done so. They had no facilities to handle them by actual receipt and delivery; they had no warehouses; the customers for whom they acted appeared to be residents of Lawrence in this Commonwealth, and there was no disclosure of any circumstance indicating any facilities on the part of these customers for the receipt, storage, or delivery of such a quantity of these commodities as the defendants ordered to be bought and sold. In a period of two months the defendants ordered purchases of above fifteen thousand barrels of pork at an aggregate cost of about two hundred and fifty thousand dollars; they also bought large quantities of lard, wheat, corn, and ribs; and the aggregate of the purchases was between four and five hundred thousand dollars, and they were nearly all made within the thirty days following June 11, 1883. In the same period they sold the same quantity of pork, lard, wheat, corn, and ribs, as was purchased with a net loss of between twenty and twenty-five thousand dollars. No warehouse receipt, no bill of lading, and no item of storage appears to have been created in any of these transactions.

The plaintiffs rendered to the defendants an account covering all their transactions, which exhibited a balance due from the defendants to the plaintiffs.

The auditor found for the defendants, solely on the ground that, under the guise of the contracts above described, the real intent was to speculate on the rise and fall of prices, and not to receive or deliver the actual commodities, and therefore that the contracts were wagers; but if his finding in this respect should be incorrect, he found that the plaintiffs were entitled to recover such balance with interest.

The auditor filed a supplemental report, which contained the following statement: —

"The contracts made between members of the Board of Trade appear, upon the evidence before me, to be valid obligations, some of which, it appears, are executed by actual deliveries; and there was no evidence before me that any ear-mark or distinctive feature of any of the contracts so made existed, by which the majority that were to be set off and cancelled without delivery of merchandise could be distinguished from the minority, in which actual delivery was made. . . . My finding relates to the understanding between the plaintiffs and the defendants, and my conclusion is unchanged that the parties to this suit entered into the dealings with each other which are the subject thereof, with a clear understanding that actual deliveries were not contemplated, and were not to be enforced; and it appears to me that the question whether the members of this Board with whom the defendants dealt had such an understanding with each other is not material to the issue of this case. If it is material, I do not find such an understanding to have been proved."

At the trial in this court the reports of the auditor were the only evidence introduced by either party, and Holmes, J., declined to submit the case to the jury or to direct a verdict for the defendants, as requested by them, but

instructed the jury that the plaintiffs were entitled to a verdict upon the auditor's report.

The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions.

R. M. Morse, Jr., & W. S. Knox, for the defendants.

E. W. Hutchins & H. Wheeler, for the plaintiffs.

FIELD, J. The rights of the parties are to be determined by the law of Illinois, but there is no evidence that the common law of Illinois differs from that of Massachusetts. We cannot take notice of the Statutes of Illinois, except so far as they are set out in the auditor's report; and the auditor has set out but one statutory provision of that State, and has found that the parties have not acted in violation of that. We are therefore to determine whether the contract between the parties, as the auditor has found it to be, is illegal and void by the common law of Massachusetts.

It is not denied that if in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract. If, however, it is agreed by the parties that the contract shall be performed according to its terms, if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract, because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be

made expressly a part of the contract. To constitute a wagering contract it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices.

The construction which we think should be given to the auditor's report is, that he finds that the contracts which the plaintiffs made on the Board of Trade with other members of that Board were not shown to be wagering contracts, and that the contract which the defendants made with the plaintiffs was, that the defendants should give orders from time to time to the plaintiffs for the purchase and the sale on account of the defendants of equal amounts of pork to be delivered in the future; that the plaintiffs should, in their own names, make these purchases and these sales on the Board of Trade; that the plaintiffs should, at or before the time of delivery, procure these contracts to be set off against each other, according to the usages of that Board; that the defendants should not be required to receive any pork and pay for it, or to deliver any pork and receive the pay for it, but should only be required to pay to the plaintiffs, and should only be entitled to receive from them the differences between the amounts of money which the pork was bought for and was sold for; and that the defendants should furnish a certain margin and should pay the plaintiffs their commissions.

The defendants gave orders in pursuance of this contract, the plaintiffs made the purchases and sales on the Board of Trade, set them off against each other, and now sue the defendants for the differences which they have paid and for their commissions.

The auditor has found that "in a vast majority of the transactions of the Board of Trade settlement was made by the set-off of opposite contracts." In his supplemental report he says, "My conclusion is unchanged, that the

parties to this suit entered into the dealings with each other, which are the subject thereof, with a clear understanding that actual deliveries were not contemplated and were not to be enforced; and it appears to me that the question whether the members of this Board with whom the defendants dealt had such an understanding with each other is not material to the issue of this case."

The peculiarity of this case, according to the findings of the auditor, is, that while the contracts which the plaintiffs made on the Board of Trade must be taken to be legal, the plaintiffs have undertaken to agree with the defendants that these contracts should not be enforced by or against them, except by settlement according to differences in prices. If such an agreement seems improbable, it is enough to say that the auditor has found that it was made. The usages of the Board of Trade were such that the plaintiffs might well think that they risked little or nothing in making such an agreement. Indeed, the distinction in practice between the majority of contracts, which by the auditor's report appear to be made and settled on the Board of Trade and wagering contracts, is not very plain; and brokers, for the purpose of encouraging speculation and of earning commissions, might be willing to guarantee to their customers that the contracts made for them on the Board of Trade should not be enforced, except by a settlement, according to differences in prices.

We do not see why the agreement between the plaintiffs and the defendants, that the defendants should not be required to receive or deliver merchandise, or to pay for or receive pay for merchandise, but should be required to pay to and to receive from the plaintiffs only the differences in prices, is not, as between the parties, open to all the objections which lie against wagering contracts. On the construction we have given to the auditor's report the plaintiffs, in their dealings with the defendants, in some respects acted as principals. In making the contracts on the Board of Trade with other brokers, they may have

been agents of the defendants. In agreeing with the defendants that they should not be compelled to perform or accept performance of the contracts so made, the plaintiffs acted for themselves as principals. If the defendants had made a contract with the plaintiffs to pay and receive the differences in the prices of pork ordered to be bought and sold for future delivery, with the understanding that no pork was to be bought or sold, this would be a wagering contract. On such a contract the defendants would win what the plaintiffs lose, and the plaintiffs would win what the defendants lose. But so far as the defendants are concerned the contracts which the auditor has found they made with the plaintiffs are contracts on which they win or lose, according to the rise or fall in prices, in the same manner as on wagering contracts. If the plaintiffs, by virtue of the contracts they made with other members of the Board of Trade, were bound to receive or deliver merchandise and to pay or receive the price therefor, on the auditor's finding they must be held as against the defendants to have agreed to do these things on their own account, and that the defendants should only be bound to pay to them and to receive from them the differences in prices. If the defendants, as undisclosed principals, should be held bound to other members of the Board of Trade on the contracts made by the plaintiffs, the plaintiffs, by the terms of their employment, would be bound to indemnify the defendants, except so far as the contracts were settled, by a payment of differences in prices. The agreement of the parties, as the auditor has found it, excludes any implied liability on the part of the defendants to indemnify the plaintiffs, except for money paid in the settlement of differences in prices. The position of the plaintiffs towards the defendants is no better than it would have been if the plaintiffs had been employed to make wagering contracts for pork on account of the defendants, and had made such contracts because the plaintiffs, relying upon the usages of the Board of Trade, have under-

taken to agree with the defendants that whatever contracts they make shall bind the defendants only as wagering contracts and shall be settled as such.

The plaintiffs contend that even if the contracts which the defendants authorized them to make, and which they made on the Board of Trade, had been wagering contracts, yet they could recover whatever money they had paid in settlement of these contracts in the manner authorized by the defendants.

In Thacker *v.* Hardy, 4 Q. B. D. 685, the court found that the plaintiff was employed to make lawful contracts, and ruled that the understanding between the plaintiff and his customer, that the contract should be so managed that only differences in prices should be paid, did not violate the provisions of 8 & 9 Vict. c. 109, § 18. Lindley, J., in giving the opinion at the trial, said, at p. 687: "What the plaintiff was employed to do was to buy and sell on the Stock Exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged. Now if gaming and wagering were illegal, I should be of the opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of the illegal designs, and would have precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred. Cannan *v.* Bryce, 3 B. & Ald. 179; M'Kinnell *v.* Robinson, 3 M. & W. 434; Lyne *v.* Siesfield, 1 H. & N. 278. But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. Fitch *v.* Jones, 5 E. & B. 238, is plain to that effect." On appeal, Brett, L. J., said, at p. 694: "It was further suggested in Cooper *v.* Neil, W. N., 1 June, 1878, that the agreement was, that although the plaintiff being broker

to the defendant, but contracting in his own person as principal, should enter into real bargains, yet the defendant should be called upon only to pay the loss if the market should be unfavorable and should receive only the profit if it proved favorable; and that no further liability should accrue to the principal, whatever might become of the broker upon the Stock Exchange; so that, as regarded the real principal, the defendant in the action, it should be a mere gambling transaction. I then considered that a transaction of that kind might fall within the provisions of 8 & 9 Vict. c. 109, § 18, but I thought that there was no evidence of it; and with respect to the present action, I say that there is no evidence that the bargain between the parties amounted to a transaction of that nature. I retract nothing from what I said in that case."

In England, wagering contracts concerning stocks or merchandise are not illegal at common law, and all the judges in Thacker *v.* Hardy were of opinion that the facts in that case did not show that the transactions between the parties were in violation of the statute.

In Irwin *v.* Williar, 110 U. S. 499, 510, the Supreme Court of the United States says of wagering contracts: "In England it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable (Thacker *v.* Hardy, *ubi supra*), while generally in this country all wagering contracts are held to be illegal and void as against public policy. Dickson's Executor *v.* Thomas, 97 Penn. St. 278; Gregory *v.* Wendell, 40 Mich. 432; Lyon *v.* Culbertson, 83 Ill. 33; Melchert *v.* American Union Telegraph Co., 3 McCrary, 521; s. c. 11 Fed. Rep. 193 and note; Barnard *v.* Backhaus, 52 Wis. 593; Kingsbury *v.* Kirwan, 77 N. Y. 612; Story *v.* Saloman, 71 N. Y. 420; Love *v.* Harvey, 114 Mass. 80." In considering how far brokers would be affected by the illegality of contracts made by them, that court says: "It is certainly true that a broker might negotiate such a contract without being

privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." This was decided in Embrey *v.* Jemison, 131 U. S. 336. See also Kahn *v.* Walton, Ohio, 1888, 20 N. E. Rep. 203; Cothran *v.* Ellis, 125 Ill. 496; Fareira *v.* Gabell, 89 Penn. St. 89; Crawford *v.* Spencer, 92 Misso. 498; Lowry *v.* Dillman, 59 Wis. 197; Whitesides *v.* Hunt, 97 Ind. 191; First National Bank *v.* Oskaloosa Packing Co., 66 Iowa, 41; Rumsey *v.* Berry, 65 Maine, 570.

It is not denied that wagering contracts are void by the common law of Massachusetts; but it is argued that they are not illegal, and that if one pays money in settlement of them at the request of another, he can recover it of the person at whose request he pays it. It is now settled here that contracts which are void at common law because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void; they are prohibited by law because they are considered vicious, and it is not necessary to impose a penalty in order to render them illegal. Bishop *v.* Palmer, 146 Mass. 469; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396. The weight of authority in this country is, we think, that brokers who knowingly make contracts that are void and illegal as against public policy, and advance money on account of them at the request of their principals, cannot recover either the money advanced or their commissions, and we are inclined to adopt this view of the law. Embrey *v.* Jemison, 131 U. S. 336, *ubi supra*, and the other cases there cited.

We are of opinion that the instruction of the presiding justice, that on the auditor's report the plaintiffs were entitled to a verdict, cannot be sustained. Whether on the auditor's report the defendants were entitled to a ruling directing the jury to render a verdict in their favor, or whether the case should have been submitted to the jury for the reasons stated in Peaslee *v.* Ross, 143 Mass. 275, is a question which has not been carefully argued, and upon which we express no opinion.

Exceptions sustained.[1]

NATIONAL BENEFIT COMPANY *v.* UNION HOSPITAL COMPANY.

Supreme Court of Minnesota, 1891.

[*Reported in* 45 *Minn.* 272.]

APPEAL from District Court, Hennepin County; YOUNG, Judge.

Clapp & Macartney, for appellant.

Keith, Evans, Thompson & Fairchild, for respondent.

MITCHELL, J. This appeal is from an order overruling a demurrer to the complaint, and the sole question is whether it appears that the contract declared on is void on grounds of public policy as being in restraint of trade. The plaintiff, an Illinois corporation, and the defendant, a Wisconsin corporation, were each organized for and engaged in the same business, to wit, "issuing and sell-

[1] Compare North *v.* Phillips, 89 Pa. 250 (1879); Irwin *v.* Williar, 110 U. S. 499 (1884); Tomblin *v.* Cullen, 69 Iowa, 229 (1886); Waugh *v.* Beck, 114 Pa. 422 (1886); Clarke *v.* Brown, 77 Ga. 606 (1886); Beadles *v.* McElrath, 85 Ky. 230 (1887); Crawford *v.* Spencer, 92 Mo. 498 (1887); Washer *v.* Bond, 40 Kan. 84 (1888); Sondheim *v.* Gilbert, 117 Ind. 71 (1888); Kahn *v.* Walton, 46 Ohio St. 195 (1889); Mohr *v.* Miesen, 47 Minn. 228 (1891). For other authorities see the note in 1 Am. St. Rep. 752–766.

ing, to such persons as might desire to purchase the same, certificates entitling the holders thereof, when sick or injured, to maintenance and to medical and surgical care, attention, and treatment in any hospital provided by said corporation, and to such support during the time said holders might be confined in such hospitals; and to provide hospitals, infirmaries, and such other places as might be necessary for the reception of the holders of the certificates issued by it without cost other than the cost of such certificates." The plaintiff was carrying on this business in a large number of the States of the Union, and had established a large and lucrative business of the character described in the States of Minnesota and Wisconsin and in the northern peninsula of Michigan, and had acquired many valuable contracts with hospitals throughout that territory entitling the holders of its certificates to treatment in said hospitals. Thereupon the parties entered into the contract sued on, the principal features of which were: (1) That the plaintiff agreed to refrain for the term of three years from selling certificates in the States of Minnesota, Wisconsin, and the northern peninsula of Michigan, except to railroad employees. (2) The plaintiff also agreed, by every proper means in its power, to secure to the defendant participation in all contracts and arrangements which it already had within that territory with hospitals, and whenever by such contracts it had the exclusive right to hospital service, so far as any company doing the same business was concerned, it would not consent to the substitution of parties other than defendant. (3) In consideration of these agreements on part of the plaintiff, the defendant agreed to pay to it certain sums of money, and also to refrain, during said term of three years, from selling certificates to the employees of any railway corporation doing business within the territory mentioned. The business carried on by these two companies was open to be engaged in within this territory by any other person or corporation organized for that purpose.

Shortly stated, the legal effect of this contract was a sale by plaintiff for a valuable consideration to defendant, of its business and good-will within the territory mentioned (except the right to sell certificates to railroad employees), with a stipulation that it would refrain from engaging in such business within that territory for three years, and a like stipulation on part of defendant not to engage in the department of the business reserved by plaintiff. It will be observed that the restriction is not general, but limited both as to space and time, and is only co-extensive in space with the business transferred. Also, that the contract does not require either company to wholly refrain from engaging in the business for which it was organized, each remaining free to engage in it without restriction anywhere except within the designated territory; and even in that each may still pursue a certain department of such business. Moreover, both companies are purely private corporations organized for purposes of private gain, and hence not charged with any public duty. Neither one nor both of these companies have exclusive right to engage in this business, it being one open to all; hence this contract does not and cannot create any monopoly. The most that can be claimed against it is that it reduces by one the number of competitors. Nor can it tend to exclude any one from hospital treatment, its only effect being to reduce by one the number of companies from whom persons desiring to secure in this form the right to hospital treatment could purchase these "benefit certificates." We feel safe in asserting that no modern decision can be found holding any such contract under a similar state of facts, void because in restraint of trade. Formerly in England the courts frowned with great severity upon every contract of this kind. The reasons for this partly grew out of the English law of apprenticeship, by which, in its original severity, no person could exercise any regular trade or handicraft except after having served a long apprenticeship. Hence, if a person was prevented

from pursuing his particular trade, he was practically deprived of all means of earning a livelihood and the State was deprived of his services. No such reason now obtains in this country, where every citizen is at liberty to change his occupation at will. Moreover, as cheaper and more rapid facilities for travel and transportation gradually changed the manner of doing business, so as to enable parties to conduct it over a vastly greater territory than formerly, the courts were necessarily compelled to readjust the test or standard of the reasonableness of restrictions as to place. And again, modern investigations have much modified the views of courts as well as political economists as to the effect of contracts tending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common-law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions, — both English and American. A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract. It is unnecessary at this time to go over ground so often travelled by others, and enter into any extended consideration of the decisions on this branch of the law. The principal cases on the subject, from the Year Books down, will be found collated in Parsons on Contracts, 748, and also in the notes to Mitchel *v.* Reynolds, 1 Smith, Lead. Cas. (9th ed.) 694. See, also, Alger *v.* Thacher, 19 Pick. 51; Match Co. *v.* Roeber, 106 N Y. 473, 13 N. E. Rep. 419; Beal *v.* Chase, 31 Mich. 490; and Navigation Co. *v.* Winsor, 20 Wall. 64.

The general consensus of all the authorities, at least the later ones, is that there is no hard and fast rule as to what contracts are void as being in restraint of trade, but each

case must be judged according to its own facts and circumstances; that a party may legally purchase the business and trade of another for the very purpose of removing or preventing competition, coupled with an undertaking on the part of the seller not to carry on the same business in the same place or within the same territory; and the question of the reasonableness of the restraint of trade depends upon whether it is such only as to afford a fair protection of the party in whose favor it is made; and the limits of restraint as to space depend upon the kind of trade or business which is the subject of the contract. Tested by these rules we find nothing legally objectionable in the contract under consideration. In addition to cases cited above, see also Moore & H. Hardware Co. *v.* Towers Hardware Co., 6 South. Rep. 41. There are two classes of cases, some of which appellant has cited, which are often confounded with, but are clearly distinguishable from, cases like the present, and stand upon an entirely different footing. The one is combinations between producers or dealers to limit the production or supply of an article so as to acquire a monopoly of it and then unreasonably enhance prices. The other is where a corporation of a *quasi* public character charged with a public duty, as a railway company, gas company, or the like, enters into a contract restrictive of its business, which would disable it from performing its duty to the public. Neither of these elements enters into this case.

Order affirmed.[1]

VANDERBURGH, J., did not sit.

[1] Compare Arnot *v.* Pittston & Elmira Coal Co., 68 N. Y. 558 (1877); Smalley *v.* Greene, 52 Iowa, 241 (1879); Western Union Tel. Co. *v.* Burlington & Southwestern Ry. Co., 11 Fed. Rep. 1 (1882); Davies *v.* Davies, 36 Ch. Div. 359 (1887); Chicago Gas Light Co. *v.* People's Gas Light Co.; 121 Ill. 530 (1887); Diamond Match Co. *v.* Roeber, 106 N. Y. 473 (1887), Bishop *v.* Palmer, 146 Mass. 469 (1888); Berlin Machine Works *v.* Perry, 71 Wis. 495 (1888); Moore & Handley Hardware Co. *v.* Towers Hardware Co., 87 Ala. 206 (1888); Gibbs *v.* Consolidated Gas Co., 130 U. S. 396 (1889); Fowle *v.* Park, 131 U. S. 88 (1889); Anderson *v.* Jett, 89 Ky.

ELIZABETH WOODMAN ET AL. *v.* INNES & ROSS ET AL.

Supreme Court of Kansas, 1891.

[*Reported in* 47 *Kan.* 26.]

Error from Sedgwick District Court.

THE opinion states the facts. Judgment for defendants, Ross and others, April 7, 1888. The plaintiffs, Woodman and others, bring the case to this court.

Harris & Vermilion, for plaintiffs in error.

Dale & Wall, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J. The material facts of this case are as follows: The firms of Innes & Ross and Aldrich & Brown, in 1882, owned property and were engaged in business on Main Street, in the city of Wichita, in this State, near the building where the post-office in Wichita was kept. They were desirous of having the post-office remain in the building near their place of business, and, as an inducement to have the post-office remain in the building, on the 1st of October, 1882, they executed and delivered to W. C. Woodman their written contract, whereby they agreed to pay him, as part of the rent for the post-office building, the sum of $75 every three months. The post-office was continuously kept in the building on Main Street up to the 1st of October, 1886, and the firms of Innes & Ross and Aldrich & Brown paid the rent up to the 1st day of October, 1885, but refused thereafter to pay any further rent.

375 (1889); Newell *v* Meyendorff, 9 Montana, 254 (1890); Herreshoff *v.* Bouteneau, 17 R. I. 189 (1890); Carter *v.* Alling, 43 Fed. Rep. 208 (1890); Western Woodenware Association *v.* Starkey, 84 Mich. 76 (1890); Tode *v.* Gross, 127 N. Y. 480 (1891). Other authorities are collected in 92 Am. Dec. 751–765; 35 Am. Rep. 269–272; 4 Am. St. Rep. 343; 4 Law Quarterly Rev. 240–241.

On the 24th of December, 1886, W. C. Woodman commenced his action to recover $303.96 for the residue of the rent, which he claimed to be due upon the written contract. While the action was pending in the court below, W. C. Woodman died, and his executors were substituted, by the order of the court, as plaintiffs. Upon the trial the defendant objected to the introduction of any evidence. The court sustained the objection, holding that the contract was against public policy, and therefore void. We approve of the ruling of the trial court. It was decided in Railroad Co. v. Ryan, 11 Kan. 609, that a contract not to have or use a depot within three miles of a given point was against public policy, and void. It was said in that case, among other things, that —

"Railroad corporations are, as we have seen, public agencies, and perform a public duty. They are agencies created by the public, with certain privileges, and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge, those obligations, is a breach of that public duty, and cannot be enforced. They are under obligations to use the utmost human sagacity and foresight in the construction of their roads, to prevent accidents to passengers. A contract that they will not use such sagacity and foresight certainly cannot be upheld. They are under obligations to employ skilful and competent engineers to manage their engines, and other competent employees to superintend and take care of the running of their trains. A contract that they will not employ such agents and servants is certainly void. They are bound to furnish reasonable facilities for the transportation of freight and passengers, both as to the quality and quantity of cars and coaches, and the number of trains, and a contract not to furnish such facilities will not be tolerated. So, though one train a day with one freight car and one passenger coach might be at present amply sufficient to do all the business between two given places, yet a contract never to run but one train a day with the one car and coach, could

not be upheld; for the necessities of trade and travel are varying, and it is the duty of the company to adjust its capacities and facilities for business to these varying necessities. Upon the same principle, it is the duty of a railroad company to furnish reasonable depot facilities. The number and location of the depots, so as to constitute reasonable depot facilities, vary with the changes and amount of population and business. A contract to leave a certain distance along the line of the road destitute of depots is in contravention of this duty."

Under the allegations of the petition, the location of the post-office in this case was to be restricted to one place. The government locates only one post-office in a city, and such office is a public one, and the general public has an interest in the location of the office. Any contract which is made for the purpose of securing the location of such an office, or which prevents, or tends to prevent, the change or removal of such an office, when the necessities of business or the interest of the public demand a change or removal, tends to the injury of the public service, and therefore is against public policy. Such contracts as referred to in the petition tend to improperly influence those engaged in the public service, and also tend to subordinate the public welfare to individual convenience or gain. Parties should not be permitted to make contracts which induce personal or private interest to overbear public duty or public welfare. County Lodge *v.* Crary, 98 Ind. 238.

Counsel for plaintiffs say that the written contract of the parties is enforceable, because it is not shown that it is unfair, or that any undue influence was to be used to retain the post-office on Main Street. Such contracts lead to secret, improper, and corrupt influences, to the injury of the public. In this view, we cannot think it good policy for the courts to enforce such contracts.

"All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public

offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." Tool Co. *v.* Norris, 2 Wall. 45.

If W. C. Woodman had no control over the location of the post-office, or if he could not, by his influence, representations, or otherwise, induce the United States post-office department to permit him to retain the post-office upon Main Street, then the contract sued upon was wholly without consideration, and for that reason ought not to be enforced.

The case of Beal *v.* Polhemus, 67 Mich. 130 (34 N. W. Rep. 532), which is referred to as fully sustaining the petition, is somewhat different in its facts, but all said therein is not satisfactory to us.

The judgment of the district court will be affirmed.

All the Justices concurring.[1]

PATRICK H. CONLAN AND JOHN CONLAN *v.* WILLIAM ROEMER.

Supreme Court of New Jersey, 1889.

[*Reported in* 52 *N. J. L.* 53.]

RULE to show cause.

Argued at June Term, 1889, before BEASLEY, Chief Justice, and Justices DEPUE, VAN SYCKEL, and SCUDDER.

For the rule, *R. Wayne Parker.*

Contra, Alpheus Struble.

The opinion of the court was delivered by

[1] Compare Bolton *v.* Madden, L. R. 9 Q. B. 35 (1873); Williamson *v.* C. R. I. & P. Ry. Co. 53 Iowa 126 (1880); and West *v.* Camden, 135 U. S. 507 (1890).

Van Syckel, J. The parties to this suit entered into a contract, of which the following is a copy: —

P. H. & J. Conlan,
Artesian and Bored Wells,
Steam Well Drillers and Contractors for Water Supply.
Pumps, Piping, Etc., Furnished.
216 Market St.

Newark, N. J., January 13th, 1888.

William Roemer, Esq.:

The undersigned agrees and proposes to furnish all the tools and labor, and drill a six-inch well on your premises, 269 Broome Street, on following terms: We to sink best artesian well-pipe to rock, and then drill into same until a plentiful supply of water is obtained; the price to be three dollars and fifty cents per foot; money to be paid when well is completed, or thirty days after finishing well; we to be supplied with steam to run our engine; to do all work in a good and workmanlike manner; we to commence within three days after acceptance; we agree to go to get a continuous supply, and warrant the same for the term of one year. It is also agreed that we shall stop at any depth when deeper than twenty-five feet, but in such case do not guarantee the quantity of water; we to be paid $\$1\frac{10}{100}$ per foot for six-inch pipe, or not more than $17.50 in all.

P. H. & J. Conlan.

Accepted — Wm. Roemer.

Under this contract the plaintiffs drilled the well to the depth of twenty-five feet without obtaining water. The defendant did not then or afterwards notify them to stop the work, and consequently they continued to drill with the knowledge of the defendant until they obtained the requisite supply of water at the depth of two hundred and seventy-six feet.

Upon the completion of the work the defendant refused to pay the contract price, and thereupon this suit was brought to recover.

On the trial of the cause, the defendant offered to prove that he was induced to enter into the said contract by the following representations made to him by the plaintiffs, and which at the time of making them the plaintiffs knew to be false: —

First. That the price named for the work was the usual price for such work, and the same price for which they had done like work for others, whom they named.

Second. That the depth to which they would be required to go to furnish the necessary supply of water would not probably exceed twenty-five feet.

The defendant also offered to show that the plaintiffs knew, from their experience in putting down wells in that locality, that water could not be reached at a less depth than two hundred and twenty feet.

This testimony was overruled and a verdict rendered for the plaintiffs for the amount claimed under the written contract.

Assertions must be considered in the light of the subject-matter in respect to which they are made. The general doctrine is that a misrepresentation unconnected with any misrepresentation of kind, quality, or quantity by the vendor, though false, affords no cause of action. Every person reposes at his peril in the opinion of others when he has equal opportunity to form his own judgment. Mere expressions of matters of opinions, however strongly or positively made, though they are false, do not constitute actionable fraud.

Statements of mere matters of opinion or judgment, although known to be false, do not constitute fraud in the absence of relations of trust and confidence. Wise *v.* Fuller, 2 Stew. Eq. 257.

It is not fraud to aver strongly that the purchaser will make a good and profitable purchase by accepting the vendor's offer.

It may be otherwise if in connection with the expression of opinion there were false assertions of fact, calculated, if true, to give a basis for the opinion. McAleer *v.* Horsey, 35 Md. 439.

Mr. Justice Miller, in Chrysler *v.* Canaday, 90 N. Y. 272, says: "That a mere assertion by a vendor as to the value of the property offered by him for sale, although untrue, and known by him to be so, will not render him responsible to the vendee in damages. There must have been a want of knowledge on the part of the latter, and a purchase by him in entire reliance upon the representations made, or there must have been some artifice employed to prevent inquiry or the obtaining of knowledge by him."

Chief Justice Shaw, in Page *v.* Bent, 2 Metc. 371, 374, draws the distinction clearly, as follows: —

"The principle is well settled that if a person makes a representation of a fact, as of his own knowledge, in relation to a subject-matter susceptible of knowledge, and such representation is not true; if the party to whom it is made relies and acts upon it as true, and sustains damage by it, — it is a fraud and deceit, for which the party making it is responsible. But in a matter of opinion, judgment, and estimate, if one states a thing as of his own knowledge, if he in fact believes it, and it is not intended to deceive, it is not a fraud, although the matter thus stated is not in fact true. The reason is that it is apparent from the subject-matter that what is thus stated as knowledge must be considered and understood by the party to whom it is addressed as an expression of strong belief only, because it is a subject of which knowledge, in its strict sense, cannot be had."

The statement by a vendor that the income from a property is greater than it in fact is, is a fraud for which an action will lie. Wise *v.* Fuller, 2 Stew. Eq. 257; Dimmock *v.* Hallett, L. R., 2 Ch. App. 21.

So, while representations as to probable sales, or value, or productiveness are not actionable, a representation as

to the income that had been derived from the royalty on a patent, or the income of a business, or a mill, or the yield of a mine, is the assertion of a fact, for which, if false, the person making it must respond in damages. Crosland *v.* Hall, 6 Stew. Eq. 111.

In Kost *v.* Bender, 25 Mich. 515, Mr. Justice Cooley held that a person who, during the negotiation for sale, professed to have some peculiar scientific knowledge as to the probability of lands proving valuable for the production of oil, rendered himself liable to damages if he made fraudulent representations in that respect.

In Allen *v.* Hart, 72 Ill. 104, the action for fraud was maintained where the vendor had peculiar means of knowledge which the vendee did not possess.

In Peffley *v.* Noland, 80 Ind. 164, the vendor in the sale of a patent right stated that he had a contract with certain persons to make the patented article at a certain price. This statement was false. The Indiana court ruled that the representation was of an existing fact and not mere opinion, and therefore was actionable.

For a reference to the numerous cases on this subject, see Cooley, Torts, 565, 566, 567; Cowley *v.* Smyth, 17 Vroom, 380; Crosland *v.* Hall, 6 Stew. Eq. 111.

The principle to be extracted from the cases is that the false statement of a fact constitutes actionable fraud.

The distinction is to be sharply drawn between the expression of an opinion as to a subject of which knowledge, in its strict sense, cannot be had, and the statement of a fact, false within the knowledge of the party who makes it.

If the vendor says "the price is very low and as reasonable as he can afford to take," it is mere commendation of his goods, or, as some of the cases say, "dealers' talk," and the rule *caveat emptor* applies. But if the vendor says, "that is the customary price, the price he charges others, and that A and B and C, who are in the same business, are selling at that price," he states a fact, and if he

knowingly misrepresents, he is guilty of a fraud which is actionable.

The assertion of the plaintiffs with respect to the price of the work sued for in this case was likewise the statement of a fact upon which the defendant had a right to rely, and not a mere opinion.

So, if the plaintiffs, who were experts in their business, stated that water would probably be reached at the depth of twenty-five feet, when, in truth, their opinion, founded upon actual previous experience, was, that it would be necessary to drill to the depth of more than two hundred feet, they asserted as a fact what they knew to be false.

The opinion of an expert in such case is a fact, which he cannot knowingly misstate without incurring legal liability. Picard *v.* McCormick, 11 Mich. 68; Kost *v.* Bender, 25 id. 515; Stewart *v.* Stearn, 63 N. H. 99; Wise *v.* Fuller, 2 Stew. Eq. 257.

My conclusion is that the evidence offered by the defendant was not competent for the purpose of varying or altering the written contract; that cannot be changed or modified by parol. Such evidence is admissible to show that the party was induced by fraud to execute it, and that therefore the right of rescission existed.

It is a general rule that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain, and sue for and recover damages for the fraud.

If he elects the former course, he must not sleep upon his rights, but must move promptly. Central Bank *v.* Pindar, 46 Barb. 467; Hunt *v.* Silk, 5 East, 249.

And the party seeking to rescind must put the opposite party *in statu quo* so far as he is able to do it. Bayard *v.* Holmes, 4 Vroom, 119.

Where the right to rescind springs from subsequently discovered fraud, the defrauded party does not lose his right to rescind because the contract has been partly exe-

cuted, and the parties cannot be fully restored to their former position. But he must rescind as soon as circumstances permit, and must not go on with the contract after the discovery of the fraud, so as to increase the injury necessarily caused to the fraudulent party by the rescission. Masson *v.* Bovet, 1 Denio, 69; Selway *v.* Fogg, 5 Mees. & W. 83; 2 Pars. Cont. 781, and cases cited.

It does not appear in this case when the defendant discovered that the plaintiffs knew that their representation as to depth of the well was false. The defendant knew that the plaintiffs had failed to find water at the depth of twenty-five feet, and he had by the terms of the written contract a right to stop the work at that time. If he had done so, the fraud of the plaintiffs would have furnished a substantial defence to a suit for the price of the work performed up to that time. He did not elect to arrest the work by the exercise of his option to do so. The drilling was prosecuted with his knowledge and without objection on his part until the requisite water supply was obtained; it must therefore be presumed that the defendant was willing to incur the expense necessary to procure water at the depth at which it was reached. There was not a contract on the part of plaintiffs that water would be found at the depth of twenty-five feet, but simply a fraudulent statement, which induced the defendant to enter into the written contract. There may be cases where the defrauded party does not waive his right to damages by permitting the contract to be fully executed after he discovers the fraud; but in this case it does not appear how other than nominal damages could have resulted to the defendant from the false statement in regard to the depth of the well.

The case shows that the fraudulent character of the statement with respect to the price of the work did not become known to the defendant until the work was fully completed. If the defendant could have succeeded in establishing the defence he offered to interpose in this respect, he had a right to rescind the contract as to price,

and leave the plaintiffs to recover upon the *quantum meruit*.

In my judgment, the rule to show cause should be made absolute.[1]

HAWKINS *v.* GRAHAM.

Supreme Judicial Court of Massachusetts, 1889.

[*Reported in* 149 *Mass.* 284.]

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, AND HOLMES, JJ.

CONTRACT for breach of an agreement in writing, which was as follows: —

"PHILADELPHIA, December 21, 1885.

"MR. JOHN C. GRAHAM:

"I do hereby agree that for and in consideration of the sum of fifteen hundred and seventy-five (1,575) dollars, to be paid me upon the satisfactory completion of the following system of heating to be established in your new mills, located at the N. E. cor. of 19th and Hamilton streets, Philadelphia, Penn., as follows, viz.: to furnish and set up (no foundations included), in complete and first-class working order, one steam fan, having an engine affixed thereto of 6½×7 inch cylinder of first-class workmanship and material, together with a heater containing a sufficient and ample quantity of one-inch wrought-iron steam piping, properly applied on the inside of a wrought-iron casing, all of which to be erected in proper working order in such portions of the buildings where found most convenient for the establishment, and where directed by yourself.

"The system of heating to be entirely dependent upon the exhaust steam from your engine at an indication of 40 H. P., and to be of such construction as to readily as well

[1] See Smith *v.* Land Corporation, 28 Ch. Div. 7 (1884).

as easily heat or raise the temperature, at any point or portion of the entire buildings into which heat from said heater may be conducted, to the temperature of seventy degrees (70°) Fahr. in the coldest weather that may be experienced; and further, that the application of said system is to avoid any back pressure upon the mill engine, or not increase any that may exist when my heater is attached, and that the erection and construction of the vertical pipes (we have arranged for one line of pipes from the vertical stand-pipes already 12″ decimetres, and shall not attach any more unless found necessary, as explained to you, they being the only kind required) shall be executed in accordance with the plans and specifications prepared by myself and under my personal supervision and direction.

"Further, the entire work is to be finished within eighteen (18) days from date of this contract, either by permanent or temporary means; if temporary, no extra charge whatsoever to be made, excepting such charges on the temporary machine as regards freight to and from our works, and clearing up. It is further declared and distinctly understood that in the event of my not being able to properly heat every portion of the buildings as hereinbefore provided for, and in accordance with the requirements as above set forth, upon a ten (10) days' notice from yourself, to the effect that the buildings are not being properly and sufficiently heated, and I cannot so heat it in ten days thereafter, I shall and will at my own expense remove all the machines and appurtenances belonging to the system, leaving the entire mill in a condition equal to that prior to the introduction of the same. In this event, no charges of any kind will be made by me on account of any of the aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory and conforming with all the requirements as above provided for, the sum of $1,575, as above provided

for to be paid me, after such acknowledgment has been made by the owner or the work demonstrated.

"GARDNER C. HAWKINS."

At the trial in the Superior Court, before Brigham, C. J., there was evidence that the plaintiff made the offer contained in the above agreement, and that the defendant accepted such offer.

The defendant contended that all the words of the contract were to be taken into consideration in its interpretation; that, in addition to the other requirements of the contract, the system of heating must prove satisfactory to the defendant; and that not till the satisfactory completion of the system and its proving satisfactory to the defendant, was anything due to the plaintiff; and the defendant offered evidence, not only that the system would not and did not do the heating as guaranteed, but that it did not prove satisfactory to the defendant, and that it had not been completed satisfactorily to him, and such acknowledgment had not been made by him.

The judge ruled that this contract did not come within the scope of the case of Brown *v.* Foster, 113 Mass. 136, and similar cases, and that if the plaintiff had fulfilled his contract in the other particulars required, he was entitled to recover, notwithstanding the dissatisfaction of the defendant; that under the contract the plaintiff was not bound to make the system satisfactory to the defendant, and that evidence on that point was immaterial; and that the trial should proceed on the theory that the satisfaction of the defendant was substantially eliminated from the case.

The plaintiff's evidence showed that the temperature of the different stories of the defendant's mill, which was one hundred and ninety-six feet long by fifty feet wide, and seventy-five feet high, varied, and that the temperature near where the hot air entered the rooms was higher by several degrees, in some instances as much as ten

degrees, than in the more remote portions of the rooms, the hot air being introduced into the rooms at only one place, at the end of each room.

The judge gave no instructions to the jury on the question of satisfaction.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

A. Hemenway & F. L. Washburn, for the defendant.

S. Lincoln, for the plaintiff.

HOLMES, J. The only question in this case is whether the written agreement between the parties left the right of the plaintiff to recover the price of the work and materials furnished by him dependent upon the actual satisfaction of the defendant. Such agreements usually are construed, not as making the defendant's declaration of dissatisfaction conclusive, in which case it would be difficult to say that they amounted to contracts (Hunt *v.* Livermore, 5 Pick. 395, 397), but as requiring an honest expression. In view of modern modes of business, it is not surprising that in some cases eager sellers or selling agents should be found taking that degree of risk with unwilling purchasers, especially where taste is involved. Brown *v.* Foster, 113 Mass. 136; Gibson *v.* Cranage, 39 Mich. 49; Wood Reaping & Mowing Machine Co. *v.* Smith, 50 Mich. 565; Zaleski *v.* Clark, 44 Conn. 218; McClure Bros. *v.* Briggs, 58 Vt. 82; Exhaust Ventilator Co. *v.* Chicago, Milwaukee & St. Paul Railway, 66 Wis. 218; Seeley *v.* Welles, 120 Penn. St. 69; Singerly *v.* Thayer, 108 Penn. St. 291; Andrews *v.* Belfield, 2 C. B. (N. S.) 779.

Still, when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases, courts have been inclined to construe agreements of this class as

agreements to do the thing in such a way as reasonably ought to satisfy the defendant. Sloan *v.* Hayden, 110 Mass. 141, 143; Braunstein *v.* Accidental Death Ins. Co., 1 B. & S. 782, 799; Dallman *v.* King, 4 Bing. N. C. 105.

By the written proposition which was accepted by the defendant, the plaintiff agrees, "in consideration of the sum of fifteen hundred and seventy-five dollars to be paid me upon the satisfactory completion of the following system of heating . . . in your new mills, . . . to furnish and set up, . . . in complete and first-class working order," certain things. Then follow conditions, tests, and other undertakings. Then "it is further declared . . . that in the event of my not being able to properly heat every portion of the buildings . . . in accordance with the requirements as above set forth," upon ten days' notice "that the buildings are not being properly and sufficiently heated, and I cannot so heat it in ten days thereafter," the plaintiff will remove the machines at his own expense. "In this event, no charges of any kind will be made by me on account of any of the aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of fifteen hundred and seventy-five dollars as above provided for to be paid me, after such acknowledgment has been made by the owner or the work demonstrated."

The last words, "or the work demonstrated," offer an alternative to the owner's acknowledgment; they imply that if the work is demonstrated, it is satisfactory within the meaning of the contract, although the owner has not acknowledged it. The previous words, "and conforming with all the requirements," tend the same way. The ten days' notice contemplated is not a notice that the owner is dissatisfied, but that the buildings "are not being properly and sufficiently heated," and the right to give it is conditioned upon the plaintiff's "not being able to

properly heat every portion of the buildings," etc. Taking these phrases with the test prescribed, that the system is "to readily as well as easily heat or raise the temperature at any point . . . to the temperature of seventy degrees (70°) Fahr. in the coldest weather that may be experienced," etc., we are of opinion that the satisfactoriness of the system and the risk taken by the plaintiff were to be determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or liking of the defendant.

Exceptions overruled.[1]

KING v. WARFIELD.

Court of Appeals of Maryland, 1887.

[*Reported in* 67 *Md.* 246.]

ACTION for non-performance of a contract. The opinion states the case.

William Brace and *B. A. Richmond,* for the appellant.

William Kealhofer, J. B. Henderson, and *George Peter,* for the appellees.

By Court, YELLOTT, J. An instrument of writing under seal, purporting to be a lease, was executed on the sixteenth day of December, 1884, by the parties to this cause. By the terms of this instrument the appellees leased twenty-one acres of land on the Washington County branch of the Baltimore and Ohio Railroad, together with a dwelling-house and other improvements thereon, to the appellant, for the term of fifteen months from the first day of January, 1885, at the yearly rent of one thousand

[1] Compare Zaleski *v.* Clark, 44 Conn. 218 (1876); Wood Machine Co. *v.* Smith, 50 Mich. 565 (1883); Plano Manufacturing Co. *v.* Ellis, 68 Mich. 101 (1888); Chism *v.* Schipper, 51 N. J. L. 1 (1888); Doll *v.* Noble, 116 N. Y. 284 (1889).

dollars, with the privilege of renewing said lease on the same terms after its expiration.

It is, however, expressly agreed between said parties that this lease shall not be binding on the appellant "in any way" until he, the said appellant, shall be "appointed and installed by the proper officers of the Baltimore and Ohio Railroad Company as freight and ticket agent of said company at Breathedsville station, in Washington County, Maryland, on the Washington County branch of the Baltimore and Ohio Railroad."

This instrument of writing under seal is set forth in full in the declaration, and the plaintiff then avers that, although he was not appointed by the officers of the said railroad company at the place aforesaid, he elected that said lease should be binding on him, and demanded possession of said demised premises from the defendants, who refused to deliver possession, and in consequence of such refusal he has brought suit for the recovery of damages.

To the declaration the defendants demurred; and the demurrer was ruled good by the court, and final judgment rendered against the plaintiff and in favor of the defendants for costs. From this judgment an appeal was taken.

The record discloses the existence of an executory contract. It is said to be an elementary principle that to render an executory contract valid, both parties must be bound. Rathbone *v.* Warren, 10 Johns. 587.

Now it will be seen that it is provided in this instrument under seal that "this lease shall not be binding on the said King in any way until the said King shall be appointed to and installed by the proper officers of the Baltimore and Ohio Railroad Company as freight and ticket agent of the said company at Breathedsville station, in Washington County, Maryland, on the Washington County branch of the Baltimore and Ohio Railroad." It is thus apparent that the appellant is entirely free from any and all obligations intended to be created by this instru-

ment under seal, until the happening of an event which has not occurred. The question then to be determined is, whether the appellees are bound by a contract during the period, while the other party remains exempt from all obligations, and could not be sued for any alleged infraction. No such principle has ever been sanctioned by adjudication when the terms of the contract impose mutual obligations. On the contrary, this court has said that "it is certainly necessary to set out in the declaration a contract binding on both parties, when a suit is instituted to recover damages for the non-performance of the contract." Berry *v.* Harper, 4 Gill & J. 470; Lamar *v.* McNamee, 10 id. 120; 32 Am. Dec. 152.

And in Routledge *v.* Grant, 3 Car. & P. 273, Best, C. J., emphatically says, "It is not just that one party should be bound when the other is not."

It is manifest that this is one of those legal principles so well established as to be beyond the scope of controversy. The proper construction of this executory contract is, that it was to become binding upon both parties when the appellant obtained the appointment he was seeking to obtain. It would become operative as soon as that contingency happened, and not before. As that contingency, which was dependent on the action of third parties, has not happened, the appellant is free from all obligations, and is therefore in no position to maintain a suit against the appellees for an alleged non-performance of a contract by which he is not bound in any respect. He cannot, at his own option, now impose on them obligations not created by the instrument under seal. As was said by Chancellor Johnson in Duvall *v.* Myers, 2 Md. Ch. 405, "a party not bound by the agreement itself has no right to call upon the judicial authority to enforce performance against the other contracting party, by expressing his willingness to perform his part of the agreement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part when events may

have rendered it advantageous to do so, but upon its originally obligatory character."

There is clearly no error in the ruling of the court below, and its judgment should be affirmed.

Judgment affirmed.

JAMES D. YERRINGTON *v.* RUFUS GREENE AND ANOTHER, ADMINISTRATORS.

Rhode Island Supreme Court, 1863.

[*Reported in* 7 *R. I.* 589.]

ASSUMPSIT against the defendants, as administrators on the estate of William W. Keach, for the recovery of damages for the breach of a contract by which the said Keach agreed to employ the plaintiff, at a salary, for three years, in his business.

At the trial of the case, under the general issue, at the March term of this court, 1863, before the Chief Justice, with a jury, it was proved by letters interchanged between the plaintiff, who then resided in Boston, and the intestate, who was a manufacturing jeweller in Providence, that on the 19th day of March, 1860, the former agreed to serve the intestate, and the latter agreed to employ the plaintiff as a clerk and salesman, having charge of the intestate's office, or place of sale, in New York, and as agent in his business in making occasional trips for him to Philadelphia for the term of three years from the first day of April, 1860, or as soon thereafter as the plaintiff could obtain a release from his employment in Boston, at a salary of twelve hundred dollars for the first year, of thirteen hundred dollars for the second year, and of fifteen hundred dollars for the third year; that on the sixteenth day of April, 1860, the plaintiff entered into the service of the intestate, under this contract, and continued to serve him under it

until the first day of April, 1861, when the said Keach died; that the defendants, as administrators of said Keach continued to employ the plaintiff, at the stipulated salary, until the sixteenth day of June, 1861, when, having discontinued the office in New York, and removed what goods were there to Providence, where Keach had another place of sale, they declined longer to employ the plaintiff, or to pay him his salary, though from that time to the date of the writ, he had been ready and willing to serve in said business, and had tendered his services in it to them, and had been unable to procure other employment; that the defendants, as administrators of Keach, wound up his business by selling the goods removed from New York, with other goods of his, at Providence, and had been allowed by the Court of Probate, for their services as administrators, the sum of three thousand dollars.

Upon this state of facts, the Chief Justice instructed the jury, that the death of Keach terminated this contract of service, and that no recovery of damages could be had of the defendants, as his administrators, for their refusal to employ the plaintiff under it afterwards; whereupon, the jury having returned a verdict for the defendants, the plaintiff, having duly excepted thereto, now moved for a new trial, on the ground of error in law in said instruction.

Browne, for the plaintiff:

It is assumed as not doubted or denied, that if Keach had lived, he would have been obligated, and could have been compelled to perform his contract. 1 Roll. Abr. Condition G; Walton *v.* Waterhouse, 2 Wms. Saund. 421, notes; Hall *v.* Wright, 1 Ellis, Blackb. & Ellis, 746. If Keach must have performed the contract had he lived, then his administrators must, or pay damages; for the *general well-settled rule* is, that parties to contracts bind *not only themselves*, but their personal *representatives;* also, that death is, in general, no revocation of contracts. Chitty on Contracts, 98; 1 Parsons on Contracts, 107-111; 2 id. 43-45. *Causes* of action, *ex contractu*, survive by common

law, and may be enforced by or against the representatives of the deceased party having assets; and *actions ex contractu*, the same. Hunt *v.* Whitney, 4 Mass. 622; Middleton *v.* Robinson, 1 Bay, 58; Mc Evers *v.* Pitkin, 1 Root, 216; 2 Williams on Executors, 1464–1467, *passim*. The *only* exception to this rule is where the contract is *personal*, as a breach of promise to marry, or requires the taste or professional skill of the decedent to perform it. Chitty, 98; 1 Parsons on Contracts, 107-111; 2 id. 43–45; Wentworth *v.* Cock, 10 Adol. & Ellis, 42 (37 Eng. C. L. R. 33); Siboni *v.* Kirkham, 1 Mees. & Welsb. 418–423; Marshall *v.* Broadhurst, 1 Tyrwhitt, 348; School District No. 1 *v.* Dauchy, 25 Conn. 530; Taylor et al. *v.* Caldwell et al., 8 Law Times Rep. 356.

The case at bar most clearly does not fall within any of these exceptions. There is nothing in this contract personal to Keach, or requiring professional skill or taste in the sense of the cases. Hundreds of other persons might have completed the contract as well as he. Such business is frequently continued by personal representatives. On the contrary, the cases like the one at bar are most clearly excluded from the exceptions by the cited cases. Siboni *v.* Kirkham, 1 Mees. & Welsb. 418; Quick *v.* Ludbarrow, 3 Bulstr. 30. Personal representatives may carry on the business of decedent so as to perform his contracts, and must do so or pay damages for breach of said contracts, as far as they have assets. Chitty on Contracts, 98; 2 Parsons on Contracts, 45; Wentworth *v.* Cock, 10 Adol. & Ellis, 47 (37 Eng. C. L. Rep. 33); Taylor et al. *v.* Caldwell et al., 8 Law Times Rep. 356; Marshall *v.* Broadhurst, 1 Tyrwhitt, 349, 350; 2 Williams on Executors, 1469, 1470.

There is a class of cases, where the *destruction of the thing*, which is the subject-matter of the contract, has, under peculiar circumstances, sometimes been held to annul the contract; as, the death of a horse before delivery, or the burning of a leased house before the lessee

had taken possession. See Taylor et al. *v.* Caldwell et al., cited above. But this class of cases has no application to this case; for there has, in the case at bar, been no destruction of the thing which was the subject-matter of contract, except by act of the defendants; and it is a class of cases that applies to living parties, as well as to cases where one of the parties is dead.

James Tillinghast, for the defendants:

It is believed that this action is without precedent. This of itself, though not perhaps conclusive, is, certainly, from the frequent occasions that must have occurred for bringing such actions, a very strong argument that the action is not maintainable. Per Lord Ellenborough, in Chamberlain, Administrator, *v.* Williamson, 2 M. & S. 415; per Wilde, J., in Stebbins *v.* Palmer, 1 Pick. 79. The general rule, that executors and administrators are bound by the contracts of the deceased has its exception which is as well settled as the rule itself, viz., that contracts which are of a personal nature do not survive. 2 Williams on Executors, 1467; 1 Parsons on Contracts, 110, &c. Thus, for breach of a promise of marriage, the executor of neither party can maintain, or is liable to an action. Chamberlain, Administrator, *v.* Williamson, 2 Maule & Sel. 415; Stebbins *v.* Palmer, 1 Pick. 79; Smith *v.* Sherman, 4 Cush. 408. So, a contract by an author to compose a work (Marshall *v.* Broadhurst, 1 Tyrwh. 349), or by a party not to exercise a particular trade (Cooke *v.* Colcraft, 2 Wm. Blacks. 856, s. c. 3 Wils. 380), is discharged by the death of the contractor. So a contract to furnish hemp of the party's own raising. Shultz & Co. *v.* Johnson, Administrator, 5 B. Mon. 497. So, it was early held, that a contract of apprenticeship was discharged by the death of the master. 3 Bacon's Abr. 556, G, and cases cited; Baxter *v.* Burfield, 2 Strange, 1266. So the death of a servant within the term of hiring discharges the contract, so that no action lies for the master against the servant's executors or administrators, for its non-performance. 1 Shep. Touch. 180; Gilb. on Cov.

472; and this principle has been carried still further; and full performance of service held to be excused by sickness, so as to allow a recovery by a servant on a *quantum meruit*. Dickey *v.* Linscott, 20 Maine, 453; Fenton *v.* Clarke, 11 Verm. 557. So, even the prevalence of a contagious disease in the neighborhood has also been held to excuse full performance. Lakeman *v.* Pollard, 43 Maine, 463.

It is plain, therefore, that had the plaintiff died, the defendants' intestate could have had no action against his estate. No action, therefore, lies against the defendants. The survivorship must be mutual if at all. Valentine *v.* Norton, 17 Shep. 194; Stebbins *v.* Palmer, 1 Pick. 79 (per Wilde, J.). The defendants are prevented by the act of God, and by the law, from availing themselves of the services of the plaintiff. The contract is therefore discharged. Baylies et al. *v.* Fettyplace et al., 7 Mass. 338, and cases in the margin. Knight *v.* Dean, 9 Shep. 531. The doing of the work by the plaintiff is the condition precedent of the liability of the defendants to pay. By circumstances beyond the control of both, the defendants are prevented from accepting performance, and the plaintiff from performing this condition. Hence, the obligation ceases. Willington *v.* West Boylston, 4 Pick. 101.

Ames, C. J. It is, in general, true, that death does not absolve a man from his contracts; but that they must be performed by his personal representatives, or their non-performance compensated, out of his estate. An exception to this rule, equally well established, at both the civil and common law, is, that in contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued ex-

istence of the particular person or chattel. The books afford many illustrations of this reasonable mode of construing contracts, *de certo corpore*, as the civil-law designation of them is, in furtherance of the presumed and probable intent of the parties. The most obvious cases are, the death of a party to a contract of marriage before the time fixed by it for the marriage; the death of an author or artist before the time contracted for the finishing and delivery of the book, picture, statue, or other work of art; the death of a certain slave promised to be delivered, or of a horse promised to be redelivered, before the day set for delivery or redelivery; and the death of a master or apprentice before the expiration of the term of service limited in the indentures. The bodily disability from supervening illness, as of an artist from blindness, to paint the picture contracted for, or of a scholar to receive the instruction his father had stipulated should be received and paid for, has been held, for the like reason, to excuse each from the performance of his contract. Hall *v.* Wright, 1 Ellis, Blackb. & Ellis, 746; Stewart *v.* Loring, 5 Allen's Rep. 306. The cases in support of these and other illustrations of the exception to the general rule are set down in the defendants' brief, and it is unnecessary to repeat them. Both at the civil and the common law, it is necessary that the party who would avail himself of this excuse for non-performance of the contract, should be without fault in the matter upon which he relies as an excuse. The latest and most instructive case, upon this subject, so far as the discussion of the principle of decision is concerned, is that of Taylor *v.* Caldwell, decided by the Queen's Bench, in May last, 8 Law Times Rep. 356. In that case it was held, that the parties were discharged from a contract to let a music hall for four specified days for a series of concerts, by the accidental destruction of the hall by fire before the first day arrived. The full and lucid exposition by Mr. Justice Blackburn, who delivered the opinion of the court, of the prior cases and of the principle upon which they had been

decided, leaves nothing further to be desired upon this subject.

Does the case at bar fall within the general rule, or within the exception we have been considering? This must depend upon the nature of the contract, whether one requiring the continuing existence of the employer, Keach, for performance on his part, or one which could, according to its spirit and meaning, be performed by the defendants, his administrators. The contract was, to employ the plaintiff as clerk and agent of the intestate, in his business, in New York and Philadelphia; and it seems to us undoubted, that the continued existence of both parties to the contract for the whole stipulated term, was the basis upon which the contract proceeded, and if called to their attention at the time of contract, must have been contemplated as such by them. The death of the plaintiff within the three years would certainly have been a legal excuse from the further performance of his contract; since it was an employment of confidence and skill, the duties of which, in the spirit of the contract, could be fulfilled by him alone. If this be the law in application to a covenant for ordinary service (Sheppard's Touchstone, 180), how much more in application to a contract for service of such confidence and skill as that of a clerk and agent for sale. On the other hand, this employment could continue no longer than the business in which the employer was engaged, and the plaintiff retained. The intestate, when living, could, by the contract, have required the services of the plaintiff in no other business than that in which he had engaged him, and with no other person than himself. It would seem, then, necessarily to follow that when the death of the employer put a stop to this business, and left no legal right over it in the administrators, except to close it up with the least loss to the estate of their decedent, they were, by the contract, bound no longer to employ the plaintiff, any more than he to serve them. The act of God had taken away the master and principal; the law had revoked his agency, and stopped the business

to which alone his contract bound him; and if he would serve the administrators in winding up the estate, it must be under a new contract with them, and under renewed powers granted by them. Any other result than that this contract of service was upon the implied condition that the employer, as well as the employed, was to continue to live during the stipulated term of employment, would involve us in the strange conclusion that the administrators might go on with the business of their intestate, in which the plaintiff must continue with powers unrevoked by the death of his principal, or, that he, with new powers from them, was bound by the contract to serve them as new masters, and in a different service, and that they were bound to grant him such powers, and employ him for the stipulated time in such service. The novelty of such a claim, and the contradiction of well-settled principles necessary to maintain it, justify the ruling of the judge who tried the cause; and this motion must be dismissed with costs, and judgment entered upon the verdict.[1]

PANTLAND HICK, Appellant, and RAYMOND & REID, Respondents.

House of Lords, 1892.

[*Reported in* [1893] *A. C.* 22.]

APPEAL from an order of the Court of Appeal reported as Hick *v.* Rodocanachi [1891], 2 Q. B. 626.

In June, 1889, the appellant's ship, the Derwentdale, was chartered by Rodocanachi & Co. to bring home a cargo of grain from a port in the Sea of Azoff. A cargo was loaded

[1] Compare Lakeman *v.* Pollard, 43 Me. 463 (1857); Robinson *v.* Davison, L. R. 6 Ex. 269 (1869); Dewey *v.* School District, 43 Mich 480 (1880); Spalding *v.* Rosa, 71 N. Y. 40 (1877); Lacy *v.* Getman, 119 N. Y. 109 (1890).

at Taganrog, the bills of lading providing that the cargo was to be delivered at the port of London and that it was to be applied for within twenty-four hours of the ship's arrival and reporting at the Custom House; otherwise the master was to be at liberty to put into lighters or land the same at the risk and expense of the owners thereof. No time was specified within which the discharge of the cargo was to be completed.

The ship arrived in the Millwall Dock on the 14th of August, 1889, and the respondents as assignees of the bills of lading duly applied for the cargo. The dock company, as the respondents' agents, began to unload on the 16th, and proceeded with due despatch till the 20th, when some of the laborers struck. Shortly afterwards the strike became general, and lasted until the 16th of September. After that date the unloading proceeded with due despatch and was completed on the 18th. Apart from the strike, the discharge should have been completed in six days. The only part of the unloading which had to be performed by the shipowner was the trimming of the cargo, and this the ship's crew were able and willing to do notwithstanding the strike.

The appellant brought an action against Rodocanachi & Co. and also against the respondents, claiming against the former demurrage under the charter-party, and against the respondents damages for the wrongful detention of the ship for an unreasonable time. At the trial before Mathew, J., and a special jury, the jury were by consent discharged, and the case left to the decision of the judge, the plaintiff's counsel making admissions which in the opinion of Lord Herschell, L. C., amounted to this, — that throughout the whole of the time during which the discharge ceased and the dock company were unable to supply labor to effect it, it was not possible for the respondents either to find any other person to provide the labor or themselves to obtain the necessary labor in any other way.

Mathew, J., entered judgment for Rodocanachi & Co.

on the ground that under a cessor clause in the charter-party their liability ceased on the arrival of the ship at the Millwall Dock. No question now arose on this part of the case.

As to the respondents, the learned judge held that they had undertaken to discharge the ship within a reasonable time, — that is to say, reasonable under ordinary circumstances, — and had failed to perform that undertaking, and he therefore entered judgment against them for £694 13 *s.*, as damages for the detention. The Court of Appeal (Lindley, Fry, and Lopes, L.JJ.), reversed the decision of Mathew, J., so far as it concerned the respondents, and ordered judgment to be entered for them.

November 29; December 1, 2. *Finlay, Q. C.*, and *Robson, Q. C.* (*Hollams* with them), for the appellant:

The respondents, as consignees, were under an unconditional obligation to discharge the cargo on arrival, and for that purpose to provide sufficient labour and appliances; and since no time was fixed by the contract, they were bound to do it within a reasonable time. The obligation to have labor ready to unload is on the same footing as the obligation to load, which is absolute. A man who undertakes to meet a boat and take a parcel out of the boat is bound to do it, and is not excused by some accident which prevents him, such as breaking his leg. The obligation to discharge within a reasonable time, no time having been specified, is implied by law. A reasonable time means a time which is reasonable under ordinary circumstances, not under actual circumstances. The respondents chose to delegate the discharge to the dock company, and they cannot excuse themselves for not proceeding with the discharge on the ground that the laborers employed by their agents were not willing to work for the wages offered. The case must turn upon what was foreseen and contemplated by the parties to the contract. A consignee who is not ready and willing to discharge continuously does not fulfil the obligation to discharge on the arrival of the vessel.

If the consignee wishes to be protected from the consequences of a strike, he must stipulate for it. The present case is governed by Wright *v.* New Zealand Shipping Company, 4 Ex. D. 165. There the charterers were not excused for the delay in unloading by the fact that there were not enough lighters: they were held bound to discharge the ship forthwith. Thesiger, L. J., said, "A reasonable time means a reasonable time under ordinary circumstances, and in the absence of some stipulation altering the implied contract between the parties, the charterers would not be relieved from the consequences of fortuitous or unforeseen impediments affecting only the due performance by them of their part of the contract. This seems to be a result of the cases of Adams *v.* Royal Mail Steam Packet Company, 5 C. B. (N. S.) 492, and Ford *v.* Cotesworth, Law Rep. 4 Q. B. 127; 5 Q. B. 544." Of those two cases the first is strongly in the appellant's favor; the charterers were held not to be excused for delay in loading, by events which were beyond their control. Thesiger, L. J., also pointed out that the shipowner cannot in any way control the unloading, and makes his arrangements for the employment of his vessel with reference to the time within which under ordinary circumstances his vessel will be discharged. What the parties contemplate when the contract is made, is that the vessel will be discharged under ordinary circumstances. Ford *v.* Cotesworth, *supra*, is not unfavorable to this contention; the ground of the decision was that the shipowners, not having performed their part of the contract, could not sue the charterers for not performing theirs. That case and the other cases relied on by the Court of Appeal are not really inconsistent with the appellant's contention. In Taylor *v.* Great Northern Railway Company, Law Rep. 1 C. P. 385, the defendants were excused for delay in delivering, by causes beyond their control. In the present case the respondents have not shown that the cause of delay was beyond their control. Burmester *v.* Hodgson, 2 Camp. 488, turned upon what was the usual and customary time for

discharging, and did not determine the point now raised. So in Postlethwaite *v.* Freeland, 4 Ex. D. 155; 5 App. Cas. 599, the contract was to discharge, not in a reasonable time, but according to the custom of the port, a very different thing, and the decision does not touch the present point, though there are no doubt *dicta* in Lord Blackburn's judgment which make against the appellant. Barker *v.* Hodgson, 3 M. & S. 267, and Hill *v.* Idle, 4 Camp. 327, turned on the point now in question and decided it in favor of the appellant. The decision in the present case by the Court of Appeal was considered in Castlegate Steamship Company *v.* Dempsey [1892], 1 Q. B. 54, 854.

[LORD HERSCHELL, L. C., referred to Good *v.* Isaacs [1892], 2 Q. B. 555.]

Sir R. E. Webster, Q. C., and *Bucknill, Q. C.* (*Leck* with them), for the respondents:

The admission made by the appellant at the trial amounted to this, that the respondents could not have done anything to avert the consequences of the strike, and did all that they could reasonably have been expected to do. The cause of the delay being thus beyond their control, the respondents are not responsible for it. Fraser *v.* Telegraph Construction Company, Law Rep. 7 Q. B. at p. 566, per Blackburn, J., and Hall *v.* Wright, 27 L. J. (N. S.) (Q. B.) 345. The case falls within the principle of Taylor *v.* Great Northern Railway Company, Law Rep. 1 C. P. 385; Ford *v.* Cotesworth, Law Rep. 4 Q. B. 127; 5 Q. B. 544; and Postlethwaite *v.* Freeland, *supra*. Those decisions are not consistent with the proposition that a reasonable time means reasonable under ordinary circumstances; it is the actual circumstances that must determine the question of reasonableness. This is no hardship on the shipowner; he has the remedy in his own hands, and can if he wishes name the number of days. In America the very point involved in this case was determined in 1862 by the New York Court of Appeals in favor of the respondents' contention. Cross *v.* Beard, 26 N. Y. Rep. (12

Smith's App.), 85, where it was held that a reasonable time must be ascertained from a consideration of all the circumstances, and that a consignee is excused for delay in unloading by *vis major*, the *vis majcr* in that case being a storm which caused other vessels to obstruct the access to the wharf.

Robson, Q. C., in reply:

If the consignee is prevented from unloading by *vis major*, that may give him a good ground of defence. But a strike for higher wages is not *vis major;* it does not amount to a physical impossibility to perform the contract, nor, in a mercantile sense, to a practical impossibility. The admission made at the trial on behalf of the appellant meant only that the respondents acted reasonably up to and after the strike, the period of strike being excepted. They were not bound to employ the dock company, and might have adopted other means. The onus of showing that the nature of the strike was such that there was a physical or a practical impossibility rested on the respondents, and they did not show it.

The House took time for consideration.

December 16. LORD HERSCHELL, L. C.:

My Lords, this action was brought by the appellant, who is a shipowner, against the respondents, who were consignees and holders of the bills of lading of a cargo carried on board the plaintiff's steamship Derwentdale, to recover damages for the detention of the vessel during her discharge at the port of London. By the bills of lading, the cargo was to be delivered in good order and condition "at the port of London."

On the 14th of August, 1889, the vessel arrived in the Millwall Dock and was reported to the Custom House. The discharge of the wheat, of which the cargo consisted, commenced on the 16th of August. On the 20th of August a strike of dock laborers began in the port of London, and some of the labourers engaged in the discharge of the Der-

wentdale then ceased to work. A few days after the strike became general, and no work was done in the discharge of the vessel until the 16th of September, when it was recommenced and finished on the 18th.

Evidence was given that apart from the strike the discharge of the vessel would have been completed in six days. The dock company were employed by the respondents to discharge the vessel. Only the trimming of the cargo was to be the work of the shipowner, otherwise the entire obligation to discharge the vessel rested on the consignees.

At the commencement of the trial, in the course of the discussion which took place as to whether the case should be heard with or without a jury, certain admissions were made by the learned counsel, and I think it well to state at the outset what I take to be the facts either proved or admitted.

I think it must be taken that throughout the whole of the time during which the discharge ceased, and the dock company were unable to supply labor to effect it, it was not possible for the respondents either to find any other person to provide the labor or themselves to obtain the necessary labor in any other way. If the terms of the bills of lading had required the discharge to be effected in any particular number of days, it is quite clear that the burden of the delay caused by the difficulty of obtaining labor would have fallen upon them, and it would have been no answer to a charge that they had failed to fulfil their obligation, to say that the circumstances had rendered it impossible for them to do so.

The bills of lading in the present case contained no such stipulation, and, therefore, in accordance with ordinary and well-known principles, the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, has the appellant proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into con-

sideration in determining whether more than a reasonable time was occupied.

The appellant's contention is, that inasmuch as the obligation to take discharge of the cargo, and to provide the necessary labor for that purpose, rested upon the respondents, the test is what time would have been required for the discharge of the vessel under ordinary circumstances, and that, inasmuch as they have to provide the labor, they must be responsible if the discharge is delayed beyond that period.

The respondents, on the other hand, contend that the question is not what time would have been necessary or what time would have been reasonable under ordinary circumstances, but what time was reasonable under existing circumstances, assuming that, in so far as the existing circumstances were extraordinary, they were not due to any act or default on the part of the respondents.

My Lords, there appears to me to be no direct authority upon the point, although there are judgments bearing on the subject to which I will presently call attention. I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon "the ordinary circumstances," say the learned counsel for the appellant. But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practicability of discharging a vessel, they may differ in summer and winter. Again, weather increasing the difficulty of, though not preventing, the discharge of a vessel may continue for so long a period that it may justly be termed extraordinary. Could it be contended that in so far as it lasted beyond the ordinary period the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the "reasonable

time" should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances, I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee. I think the balance of authority, both as regards the cases which relate to contracts by a consignee to take discharge, and those in which the question what is a reasonable time has had to be answered when analogous obligations were under consideration, is distinctly in favor of the view taken by the court below.

In Postlethwaite *v.* Freeland, 5 App. Cas. 599, 608, the law was stated by Lord Selborne thus: "If, on the other hand, there is no fixed time, the law implies an agreement to discharge the cargo within a reasonable time; that is (as was said by Blackburn, J., in Ford *v.* Cotesworth, Law Rep. 4 Q. B. 127; 5 Q. B. 544), a reasonable time under the circumstances."

In the same case Lord Blackburn clearly indicated that this view of the law was, in his opinion, correct and in accordance with the current of previous authority; and he not only quoted with approval the law laid down in Taylor *v.* Great Northern Railway Company, Law Rep. 1 C. P. 385, that "a reasonable time" meant what was reasonable under the circumstances as distinguished from "the ordinary time," which it had been contended was the same thing as a reasonable time, but stated that in his opinion the law so laid down was applicable to the case then under consideration.

It is true that in the case of Postlethwaite *v.* Freeland, 4 Ex. D. 155; 5 App. Cas. 599, the point which has now to be determined did not directly arise, inasmuch as in that case the charter-party contained the stipulation that the cargo was to be discharged with all despatch according to the custom of the port, and I cannot agree with what

appears to have been the view of Lord Blackburn, that this was necessarily the same as the implied obligation to discharge within a reasonable time.

In that case it was proved that the mode of discharge customary in the port was by means of a warp and lighters, and that these were under the absolute control of a company to which the government authorities had transferred all their powers, and that the company allowed vessels the use of the warp and lighters in turn. The result was that, owing to the presence of a considerable number of ships, the turn of the appellant's vessel did not come for a considerable time.

It appears to me that, under these circumstances, the judgment was inevitable, that the cargo had been discharged with all despatch according to the custom of the port, and also that Postlethwaite *v.* Freeland, *supra*, cannot be taken as a decision concluding the question arising on this appeal. The *dicta* are undoubtedly of great weight, and I concur with the result at which Lord Blackburn arrived, that, so far as there was prior authority, it pointed in the direction of the view adopted in the present case by the Court of Appeal. Lord Blackburn excepted the case of Wright *v.* New Zealand Shipping Company, 4 Ex. D. 165, regarding the decision there as conflicting with that of the Court of Appeal in Postlethwaite *v.* Freeland, 4 Ex. D. 155. Now it is to be observed that Thesiger, L. J., who had been a party to the judgment in Wright *v.* New Zealand Shipping Company, *supra*, was also a party to the decision in Postlethwaite *v.* Freeland, *supra*, in the Court of Appeal. He manifestly did not intend to lay down the law differently in the two cases, nor do I think there is any necessary conflict between them, although, no doubt, expressions are to be found in the judgments in Wright *v.* New Zealand Shipping Company, *supra*, which favor the contention of the appellant in the present case. Cotton, L. J., in his judgment in that case in terms says that he will not attempt to lay down an exhaustive rule, but will

speak chiefly with reference to the case then before the court. The facts there were that the cargo was to be delivered into lighters alongside, or at the wharf, as charterer's agents might direct, no time being fixed within which the discharge was to take place. At the port of discharge there were only two firms of lightermen for discharging cargoes, one of which worked solely for the defendants, the charterers, and the captain was compelled to employ this firm alone to discharge the vessel. At the time when the vessel arrived, the port was unusually crowded by a "rush" of vessels, and about twenty vessels were lying there, of which one-half either belonged to or were chartered by the defendants. The number of lighters was small; and it was proved that, after the arrival of the vessel, preference in discharging cargoes was shown to vessels with "round" charters.

The learned judge who tried the case, in summing up, told the jury that they were to take into consideration the circumstance that the port was full of vessels; but he did not directly tell them not to consider the deficiency of lighters caused by the large number of ships, so far as that state of things had been produced by the defendants themselves; nor did he tell them that the defendants were bound to provide the means of unloading within a reasonable time; nor that they were bound to allot the lighters proportionately among the vessels, or to use the lighters for them in the order in which they arrived. The jury found in favor of the defendants, and the appeal was against the judgment of the Queen's Bench Division making absolute a rule for a new trial.

It will thus be seen that the circumstances which prevented the vessel being discharged within the ordinary time were not beyond the control of the defendants. It was not shown that they could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier, and so have avoided the delay which took place. Under these circumstances I think the decision was perfectly right, and a new trial properly granted.

In my opinion the cases referred to by the appellant's counsel, in which it has been held that there was a breach of the obligation on the part of a charterer to supply a cargo, do not involve the assertion of any doctrine in conflict with that which has been laid down in the present case by the Court of Appeal.

For these reasons, my Lords, I am of opinion that the judgment of the court below was correct, and ought to be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD WATSON:

My Lords, although the precise question raised in this appeal is said to be submitted for the first time to the determination of an English court, the principles which must govern its decision are as old as the law of contract.

When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted, and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.

In the face of the admission given by him at the trial, it is in vain for the appellant to suggest that the delay which occurred in unloading the Derwentdale's cargo was owing to causes under the respondents' control, or to their failure to do anything which could possibly or reasonably have been done, in order to avoid that delay. In that state of the law and of the facts it is, in my opinion, impossible that the appellant can prevail unless he is able to show that the rule, as administered in the case of other

contracts, is subject, when the contract is constituted by bill of lading, to the singular exception that the owner of the goods must be held to have acted unreasonably, and to be liable for the delay, whenever the operation of unloading is stopped by an unforeseen obstacle which he did nothing to create and is powerless to remove. A proposition of that character requires some authority to support it, but none has been produced.

In none of the cases cited at the bar does it appear to me that the point now raised was present to the minds of the learned judges. But it is sufficient for the purposes of this appeal that, whilst nothing was said, in any of them, which lends the least countenance to the proposition maintained by the appellant, much was said pointing in an opposite direction. These cases, in so far as they were founded on by the appellant as authorities in his favor, have been carefully examined in the opinion just delivered by my noble and learned friend, to whose reasons for affirming the judgment of the Court of Appeal I have really nothing to add.

LORD ASHBOURNE:

My Lords, the question raised in this appeal is important, and is up to this not covered by any express authority. Having regard to the admissions of the parties, the sole question is, who is to bear the loss caused by the strike? who is to bear the risk of the strike, assuming each party to be innocent, that each party did what he could, and that the happening of the strike was entirely beyond and outside the control of either?

The contract not naming any time for unloading, the obligation of the defendants was to unload within the time implied by law; that is, a reasonable time. What is the meaning of this expression, "reasonable time"? It is obvious that "reasonable" cannot mean a definite and fixed time. It would not be "reasonable," if it was not sufficiently elastic to allow the consideration of circumstances, which all reason would require to be taken into

account. The appellant accordingly admits that the consignee has a right to have all ordinary circumstances taken into account, but insists that all extraordinary circumstances are to be excluded from consideration. Is this distinction sound, and does it rest upon any real principle? If the consignee does all he can, is not his conduct reasonable? If by circumstances absolutely outside his control he can do nothing, is his inaction unreasonable? If it is reasonable to consider some circumstances outside his control in favor of the consignee, why are not all circumstances in the events which actually happen, and which he cannot control, also to be taken into account? In considering how to ascertain "reasonable time," must not the question come in, whether the consignee in the circumstances which eventuated acted unreasonably? If throughout the consignee acted reasonably; if he did all he could; if he omitted nothing that he should have done, — why should all the circumstances be arbitrarily divided into ordinary and extraordinary for the purpose of putting a narrow and artificial meaning upon the words "reasonable time"? Unless *lex cogit ad impossibilia*, I think when the parties have used a form of contract which names no day, and leaves the discharge of the cargo to be made within the reasonable time implied by law, that reasonable time should be ascertained by a consideration of all circumstances which eventually happen, and which are outside the control of the consignee.

It is somewhat strange that this important question has not heretofore been clearly and finally settled by direct authority, and it is manifest from the arguments addressed to your Lordships that the decisions in somewhat similar cases are conflicting, and the opinions of eminent judges would appear not to harmonize. The particular point involved in this appeal has never, I believe, been expressly discussed or decided, although the decisions which have been referred to deal with topics and considerations most apposite to the case before your Lordships.

The case of Ford *v.* Cotesworth, Law Rep. 4 Q. B. 127; 5 Q. B. 544, is worthy of attention. The contract was silent as to time, and therefore the freighter was bound to unload within a reasonable time. Owing to threats of bombardment, the cargo could not be landed in the usual time, and it was held that the charterer was not liable for the delay. Cockburn, C. J., in his summing-up, said "there would be a point of law whether this case was to be decided with reference to the ordinary state of things at the port, or whether any extraordinary circumstances that prevented the unloading might be taken into account."

The questions left to the jury were, whether, looking to the ordinary state of things at the port, there was any unreasonable delay; whether, looking to the extraordinary circumstances, there was any unreasonable delay; whether there was any delay caused by political circumstances over which the consignees had no control; was any delay caused by the default of the consignees; and to contingently assess the damages for the time during which the ship was kept at her berth doing nothing by the action of the government of the place and the threats of bombardment.

The jury, in answer to the first two questions, found that there had been no unreasonable delay, and they assessed the damage, if any was to be allowed. The plaintiff applied to the Queen's Bench to enter the verdict for him, and that court held that the contract implied by law was that each party would use reasonable diligence in performing their part of the delivery, which by the custom of the port fell upon him; and that there was no implied contract that the discharge should be performed in the time usually taken at the port. Blackburn, J., in pronouncing the judgment of the Court said, at p. 136: "We are aware of no authority for saying that the law implies a contract to discharge in the *usual time*, except what is said in Burmester *v.* Hodgson, 2 Camp. 488, in which case it was not necessary for the decision. We think that the contract which the law implies is only that the merchant

and shipowner should each use reasonable despatch in performing his part. That such was the opinion of Lord Tenterden appears to be implied from his ruling in Rogers *v.* Hunter, Mood. & M. 65, as to what was the obligation of the holder of a bill of lading. If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls." The Exchequer Chamber also on appeal upheld the verdict for the defendants. Martin, B., in giving judgment, said: "I am not aware of any case which goes to impose by mere implication of law, without any stipulation whatever, so unreasonable a liability as that which the plaintiffs seek to impose on the defendants, that they are to be answerable for the delay caused by *vis major*."

Ten years later in the year 1878, came the case of Wright *v.* New Zealand Shipping Company, 4 Ex. D. 165, which has been so much relied on by the appellant. There the charter-party was silent as to time, and therefore it was implied that the ship should be unloaded within a reasonable time. Bramwell, L. J., said, "a reasonable time for doing an act is a time within which it can be done by a person working reasonably," and Thesiger, L. J., said, "a reasonable time means a reasonable time under ordinary circumstances." This decision is naturally relied on by the appellant, although it was not intended in that case to lay down any general rule, and the circumstances were not at all outside the control of the defendants.

The case of Postlethwaite *v.* Freeland, 4 Ex. D. 155; 5 App. Cas. 599, is most important in consequence of many of the *dicta*, although the precise point involved in this case did not actually arise. The Earl of Selborne, in giving judgment in the House of Lords, said, "If there is no time fixed, the law implies an agreement to discharge the cargo within a reasonable time, that is, as was said by Blackburn, J., in Ford *v.* Cotesworth, Law Rep. 4 Q. B. 127, 5 Q. B. 544, a reasonable time under the circumstances."

Lord Blackburn's own judgment in this case is the strongest decision in favor of the contention relied on by the respondents, and presents the topics against the appellant's contention with great force. These cases and others cited during the argument show that there is a conflict of judicial opinion on the question involved, but, in my opinion, the preponderance of authority and reasoning is against the appellant. Besides, the authorities by way of analogy (as forcibly pointed out by Fry, L. J.) are also against the appellant, and in favor of the view, that reasonable time must be determined by reference to the actual events which occur. In the case of Taylor *v.* Great Northern Railway Company, Law Rep. 1 C. P. 385, it was held that a common carrier was only bound to carry within a reasonable time, looking at all the circumstances of the case. Erle, C. J., says plainly, "I take reasonable time to mean a time within which a carrier can deliver, using all reasonable exertions."

The case of Hall *v.* Wright, 27 L. J. (N. S.) (Q. B.) 345, also shows an effort to apply a liberal construction of "reasonable time" in an action of breach of promise of marriage.

And the American case of Cross *v.* Beard, 26 N. Y. Rep. (12 Smith's App.) 85, decided thirty years ago, shows that a breach in a canal and a storm on a lake were taken into account in measuring what was reasonable time.

But, my Lords, it is not upon analogies or upon conflicting authorities alone that the decision of your Lordships can rest, although they are most valuable and important to elucidate the position. Principle and reason, in my opinion, alike oppose the contention of the appellant. It is somewhat hard to make either party suffer, but there is no help for it. It must be remembered that there are forms of bills of lading which expressly name strikes and such contingencies, and cast the responsibility upon the consignees. If the shipowner wishes the merchant to be answerable for such events, he can stipulate for it expressly. It is no

doubt hard on the shipowner in this case, but I do not apprehend any disturbance in mercantile contracts, as parties can readily, if they please, change the terms of future contracts, and prevent the possibility of misunderstanding or surprise. On the grounds that I have referred to, I think the judgment of the Court of Appeal should be affirmed.

My noble and learned friend, Lord Morris, who is unavoidably absent to-day, has requested me to say that he concurs in the conclusion at which your Lordships have unanimously arrived.

Lord Field. My Lords, I concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, 16th Dec. 1892.

Solicitors for appellant: *Downing, Holman, & Co.*
Solicitors for respondent: *Lowless & Co.*

LOUIS WINDMULLER et al., Respondents, *v.* THOMAS J. POPE et al., Appellants.

Court of Appeals of New York, 1887.

[*Reported in* 107 *N. Y.* 674.[1]]

This was an action to recover damages for alleged breach of a contract to purchase a quantity of iron.

In January, 1880, the parties entered into a contract for the sale by plaintiffs and purchase by defendants of "about twelve hundred tons' old iron, Vignol rails, for shipment from Europe at sellers' option, by sail or steam vessels to New York, Philadelphia, or Baltimore, at any time from May 1 to July 15, 1880, at thirty-five dollars per ton, . . . deliverable in vessels at either of the above ports on arrival." On or about June 12, 1880, defendants notified plaintiffs that they would not receive or pay for the iron, or any part of it, and advised that plaintiffs better stop at

[1] Among "Memoranda of Causes not Reported in Full."

once in attempting to carry out the contract. Plaintiffs thereupon sold the iron abroad which they had purchased to carry out the contract.

The following is an extract from the opinion: —

"We think no error is presented upon the record which requires a reversal of the judgment. The defendants having, on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach without tendering the delivery of the iron or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it, and by a sale of the iron to other parties, changed their position. Dillon *v.* Anderson, 43 N. Y. 231; Howard *v.* Daly, 61 id. 362; Ferris *v.* Spooner, 102 id. 12; Hochster *v.* De La Tour, 2 El. & Bl. 678; Cort *v.* Ambergate, etc., Railway Co., 17 Ad. & El. 127; Crabtree *v.* Messersmith, 19 Ia. 179; Benjamin on Sales, §§ 567, 568.

"The ordinary rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract-price and the market value of the property at the time and place of delivery. Dana *v.* Fiedler, 12 N. Y 40, Dustan *v.* McAndrew, 44 id. 72; Cahen *v.* Platt, 69 id. 348."

Carlisle Norwood, Jr., and *W. W. Niles*, for appellants.

Bernard Roelker and *Cephas Brainerd*, for respondents.

Per Curiam opinion for affirmance.

All concur.

Judgment affirmed.[1]

[1] Compare Ford *v.* Tiley, 6 B. & C. 325 (1827); Heard *v.* Bowers, 23 Pick. 455 (1839); Cort *v.* Ambergate, etc., Ry. Co., 17 Q. B. 127 (1851);

SYNGE *v.* SYNGE.

Court of Appeal.

[*Reported in* [1894] 1 *Q. B.* 466.]

APPEAL from a judgment of Mathew, J., on further consideration.

The claim in this action was on an ante-nuptial promise, made by the defendant in consideration of marriage, to leave by will to the plaintiff a certain house and land for her lifetime. It was alleged that the defendant had conveyed his whole estate and interest in the property to third persons, and thereby incapacitated himself from keeping his promise; and the plaintiff claimed a declaration that she was entitled to a life estate in the premises commencing on the death of her husband, and that the conveyance thereof was subject to her life estate, and in the alternative the plaintiff claimed damages for breach of agreement. The agreement relied on was contained in a letter from the defendant to the plaintiff written a short time before the marriage; but the learned judge was of opinion that the result of the evidence was that the letter did not amount to a contract, but only to an expression of an intention on the part of the defendant to leave the house and land to the plaintiff, and that she had so understood it. He accordingly gave judgment for the defendant.

The plaintiff appealed.

1893, Nov. 30. *Bucknill, Q. C.*, and *Blake Odgers, Q. C.*, for the plaintiff. There was a binding contract to leave the property to the plaintiff for her life, signed by the defendant and consented to by the plaintiff, and on the

Hochster *v.* De La Tour, 2 E. & B. 678 (1853); Avery *v.* Bowden, 5 E & B. 714 (1855); Smith *v.* Lewis, 26 Conn. 110, 118–119 (1857); Crabtree *v.* Messersmith, 19 Iowa, 179 (1865); Burtis *v.* Thompson, 42 N. Y. 246 (1870); Frost *v.* Knight, L. R. 7 Ex. 111 (1872); Howard *v.* Daly, 61 N. Y. 362 (1875); Hinckley *v.* Pittsburgh Steel Co., 121 U. S. 264 (1887); Davis *v.* Bronson, 2 N. Dak. 300 (1891). See note in 33 Am. St. Rep. 791.

faith of which the marriage took place. For breach of such a contract damages are recoverable. Needham *v.* Kirkman, 3 B. & A. 531; Goilmere *v.* Battison, 1 Vern. 48, *sub. nom.* Goylmer *v.* Paddiston, 2 Vent. 353.

The defendant has put it out of his power to carry out his promise, and there is therefore an immediate right of action to recover damages for breach of contract. Hochster *v.* De La Tour, 2 E. & B. 678; Short *v.* Stone, 8 Q. B. 358; Ford *v.* Tiley, 6 B. & C. 325; Frost *v.* Knight, Law. Rep. 7 Ex. 111. [They also cited Maddison *v.* Alderson, 8 App. Cas. 467.]

Coleridge, Q. C., and *W. Howland Roberts*, for the defendant. The learned judge was right in the view that there was no binding contract. Even if there were a promise, it would be conditional on survivorship, and it does not follow that there will be a breach. These considerations are opposed to the idea that there is an immediate right of action, and there are no cases of an action brought before the death of the promisor. The form of the question asked in Needham *v.* Kirkman, 3 B. & A. 531, shows that before the death of the promisor there could be no breach. [They cited also *In re Parkin* [1892], 3 Ch. 510.]

Bucknill, Q. C., in reply.

1894, Jan. 17. KAY, L. J., delivered the judgment of the Court, LORD ESHER, M. R., LOPES, L. J., and KAY, L. J. The questions which arise in this case are these: —

1. Was there a binding contract?

2. Was it such a contract as could be enforced in equity, or was there a remedy in damages for the breach of it?

3. Has the time arrived at which such remedy can be asserted?

4. If the remedy be by way of damages, what amount of damages should be given?

The action was tried by a judge without a jury, so that all questions both of fact and law are open on this appeal.

It will be convenient to consider the questions in the order in which they are stated.

The alleged contract is contained in a letter of December 24, 1883, by the defendant to a lady whom he was desirous to marry, and is in these words: —

"You, my love, thoroughly understand the terms (and I daresay have told Mr. Woodruff on which we are to put a stop to all this bother by becoming one another) which are that I leave house and land to you for your lifetime. . . . True, it is possible but highly improbable that I might come in for the title, and should be much better off. Should such a thing happen, we could see what I ought and would do for you."

There seems to be no doubt that the house and land referred to were the house and a small piece of land at Ardfield in Devonshire, worth, it is said, about £60 or £70 a year, in which the defendant was then residing with two daughters by a former marriage. The defendant was not then Sir R. Synge. He succeeded to the title afterwards. The lady who is the plaintiff had some property of her own of which Mr. Woodruff was trustee. He was not a solicitor.

The construction of the letter is plain. It is a statement of the "terms" as to property on which the defendant proposed to marry the lady. The marriage took place on January 5, 1884, ten days after the date of the letter.

It is argued that the plaintiff did not understand it to be a binding promise, and did not so treat it. [The judgment then dealt with the evidence, and continued: —]

The learned judge who decided this case has held that the letter was not treated by the lady as a contract, although by the advice of Mr. Woodruff she preserved it. The inference, however, that she accepted the terms and married on the faith of the promise in writing, seems to us irresistible. We cannot, with deference to the learned judge, agree in his view that she treated the letter as a mere statement of intention by which the intended hus-

band was not to be bound. The law relating to proposals of this kind before marriage was thus stated by Lord Lyndhurst, L. C., in Hammersley *v.* De Biel, 12 Cl. & F. 45, at p. 78: "The principle of law, at least of equity, is this — that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal."

We are of opinion that the proposal of terms in this case was made as an inducement to the lady to marry, that she consented to the terms, and married the defendant on the faith that he would keep his word, and that accordingly there was a binding contract on the defendant's part to leave to his wife the house and land at Ardfield for her life.

Then, secondly, what is the remedy? Marriage is a valuable consideration for such a contract of the highest order, and where, as here, the contract is in writing, so that there is no question upon the Statute of Frauds, in the language already quoted, a court of equity will take care that the party who marries on the faith of such a proposal "is not disappointed, and will give effect to the proposal."

In Hammersley *v.* De Biel, *supra*, the proposal was made on behalf of the intended wife's father, by his authority, and was reduced into writing, and was to the effect that the father would pay down £10,000, to be settled on the intended husband and wife and their children, the husband to secure a jointure of £500 a year to the wife if she survived him; and then followed the provision on which the question arose, by which the father "proposes for the present to allow his daughter £200 per annum for her private use, . . . and also intends to leave a further sum of £10,000 in his will to Miss Thomson, to be settled on

her and her children." After the father's death, without having made the promised provision by will, the only child of the marriage — his mother having died before her father — instituted a suit in equity against his grandfather's executors to recover £10,000 out of his assets. Lord Langdale, M. R., held that by acceptance the proposal had "ripened into an agreement," and that the plaintiff was entitled to the relief he prayed — i. e., to the sum of £10,000, with interest at 4 per cent. from the end of one year after the father's death, on the footing of a legacy. Lord Cottenham, L. C., affirmed this decision, saying this, 12 Cl. & F. 45, at p. 62, n.: "I propose, first, to consider whether there was any such agreement previous to the marriage of the plaintiff's father and mother as was binding on the late Mr. Thomson to give an additional £10,000 as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract, such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum, or in the other evidence in the cause, proof of any such contract; and this may have led to the defence set up by the defendants; but when the authorities on this subject are attended to, it will be found that no such formal contract is required."

This was affirmed in the House of Lords by Lord Lyndhurst, L. C., Lord Brougham, and Lord Campbell, without calling upon the respondents. We have examined the case closely, because it is of the highest authority, not merely as a judgment of the House of Lords, but it was decided by some of the best equity lawyers of that time. Lord St. Leonards has criticised the decision on the ground that the memorandum in that case might have been construed as a mere expression of an intention, not as a definite proposal which could by acceptance ripen into a contract. Sugden's Law of Property, p. 53. But he does not intimate a doubt that the decision was right if the proposal was not merely of an intention which might be changed. Therefore, a

definite proposal in writing so as to satisfy the Statute of Frauds to leave property by will, made to induce a marriage, and accepted, and the marriage made on the faith of it, will be enforced in equity.

Then, what is the remedy where the proposal relates to a defined piece of real property? We have no doubt of the power of the court to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.

It is argued that courts of equity cannot compel a man to make a will. But neither can they compel him to execute a deed. They, however, can decree the heir or devisee in such a case to convey the land to the widow for life, and under the Trustee Acts can make a vesting order, or direct that some one shall convey for him if he refuses. And under the like circumstances, the court has power to make a declaration of the lady's right.

But counsel do not press for such relief, or ask for a declaration to bind the house and land. The relief they ask is damages for breach of contract. It seems to be proved that the grantees of the property under the deeds executed by Sir R. Synge took without notice of the letter; they acquired, as we understand, the legal estate by the grant. If there was any valuable consideration moving from them, no relief in the nature of specific performance could be given against them; and it is suggested that the property, being partly leasehold, according to the decision in Price *v.* Jenkins, 5 Ch. D. 619, there was such valuable consideration. It is not necessary to examine this argument, as counsel elect to ask for damages only.

Sir R. Synge had all his lifetime to perform this contract; but, in order to perform it, he must in his lifetime make a disposition in favor of Lady Synge. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only take effect at his death; but the breach must take place in his lifetime, and as by

the conveyance to his daughters he put it absolutely out of his power to perform this contract, Lady Synge, according to well-known decisions (Hochster *v.* De La Tour, 2 E. & B. 678; Frost *v.* Knight, Law Rep. 7 Ex. 111), had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted.

We have not before us the materials for assessing such damages. The amount must depend on the value of the possible life estate which Lady Synge would be entitled to if she survived her husband. Their comparative ages would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages.

Sir R. Synge must pay the costs of the action here and in the court below. *Appeal allowed.*

Solicitors for plaintiff: *Torr, Janeway, Gribble, Odie, & Sinclair, for Eastley, Jarman, & Eastley, Torquay.*

Solicitors for defendant: *Wood, Bigg, & Nash, for Kitson, Mackenzie, & Hext, Torquay.* A. M.

BOOK II.

A SELECTION OF CASES ON TORTS.

FORDE *v.* SKINNER AND OTHERS.

Nisi Prius, 1830.

[*Reported in* 4 *C. & P.* 239.]

FALSE imprisonment, with a count for a common assault. Plea — General issue.

The defendants were the parish officers of the parish of Ninfield, in Sussex; and the plaintiff was a young woman who was a pauper in the poor-house there. The false imprisonment was not proved; and the assault complained of was, that, on the 10th of December, 1829, the defendants sent for the plaintiff into a room in the poor-house, and by force, and against her consent, cut off her hair; and it appeared, that in the struggle, occasioned by her resisting, one of her arms was bruised. It was shown that the plaintiff wore long hair, and kept it in a clean and neat state; and there was also evidence given that when the plaintiff had, shortly before, gone with two of the defendants before the magistrates at Battle, one of the defendants said, alluding to the plaintiff and her sister, who was also in the poor-house, that he would soon do something "to take their pride down." It also appeared that the sister's hair was cut off in a similar way.

BAYLEY, J. (in summing up). However desirable such a regulation as that of cutting off the hair of persons in a poor-house may be with regard to health and cleanli-

ness, yet it is altogether unauthorized by law, and is a wrongful act, if done without the consent of the party. If, in this case, it was done violently and with force, and with the malicious intent imputed, namely, of "taking down their pride," and not with a view to cleanliness, that will be an aggravation, and ought to increase the damages. You will therefore decide on the motives which actuated the defendants, and according to that decision you will estimate the amount of damages.

Verdict for the plaintiff — Damages £60.

Platt and *Thesiger*, for the plaintiff.
Gurney, for the defendants.[1]

PURSELL *v.* HORN AND ELIZABETH, HIS WIFE.

Queen's Bench, 1838.

[*Reported in* 8 *A. & E.* 602.]

TRESPASS. The declaration stated that defendant Elizabeth, on etc., assaulted plaintiff, "and then cast and threw divers large quantities of boiling water on the plaintiff, and also then wetted, damaged, and spoiled the clothes and wearing apparel, to wit, one great-coat," etc., of the value etc., "which the plaintiff then wore:" by means of which he was hurt, scalded, etc., and forced to expend money in endeavoring to cure himself.

Pleas. 1. "As to the said assaulting the said plaintiff as in the said declaration mentioned, and wetting, damaging, and spoiling the said clothes and wearing apparel of the said plaintiff, as therein also mentioned;" that plaintiff assaulted and would have beaten defendant Elizabeth, wherefore she defended herself as she lawfully, etc., "and in so doing did necessarily and unavoidably a little assault the said plaintiff, and a little wet, damage, and spoil his said clothes and wearing apparel in the said declaration

[1] See Wam. St. Cas. §§ 1–3, 63.

mentioned, doing no unnecessary damage," etc. Verification. 2. As to the residue of the trespasses in the declaration mentioned, Not Guilty. Replication to the first plea, *de injuriâ*. Issues joined on the replication and second plea.

On the trial before Littledale, J., at the Northampton Spring assizes, 1837, the jury found a verdict for the plaintiff, damages one farthing. The learned judge did not certify under stat. 22 & 23 Car. 2. c. 9. s. 136. The finding stated in the *postea* was, on the first issue, that Elizabeth Horn of her own wrong and without the cause, etc., committed the said trespasses, in manner and form, etc.; and, on the second issue, that, "as to the residue of the said trespasses, the said defendants are guilty thereof, in manner and form," etc.: and that the jury assess the plaintiff's damages, over and above his costs and charges, etc., to one farthing, and, for those costs and charges, to 40*s*. Waddington, in Trinity Term, 1837, obtained a rule *nisi* for amending the *postea* by substituting one farthing costs for 40*s*.

Humfrey now showed cause. Stat. 22 & 23 Car. 2. c. 9, s. 136, deprives of costs "in all actions of trespass, assault and battery, and other personal actions," where the damages are found below forty shillings, and the judge does not certify "that an assault and battery was sufficiently proved." This is not a case within the statute, because no battery was alleged. It is laid down in Com. Dig. Battery, (C), that, "If a man strike at another, and do not touch him, it is no battery, but it will be an assault." "So" "if he throws stones, water, or other liquor upon him."[1] [LORD DENMAN, C. J. Is it no battery, if a man throws a stone at another and breaks his arm? The notion must have been that battery could not be committed except with something which the party held in his hand at the time; but that cannot be maintained.] If throwing

[1] Citing Reg. Brev. 108 *b*.

water on the plaintiff be a battery, the justification here admits it, and then no certificate was necessary.

Waddington, contrà. The words "upon him," in Com. Dig. Battery, (C), must have been used by mistake. This may be inferred from other *placita* under the same head. [He was stopped by the court on this point.] The justification here omits any reference to that which constitutes a battery. Nothing is justified but assaulting the plaintiff, and wetting, damaging, and spoiling his clothes. The latter averments are mere matter of *gravamen*, and ancillary to the main charge; they do not, therefore, take the case out of the statute. Bannister *v.* Fisher,[1] Mears *v.* Greenaway,[2] Hamson *v.* Adshead.[3] In Johnson *v.* Northwood[4] the defendant, in his pleas, confessed a battery. In the present justification the fact to which the wetting and damaging are treated as the *gravamen* is not a battery, but merely "assaulting" the plaintiff. The clothes might be wetted and damaged without a battery.

Lord Denman, C. J. I think that a battery does not necessarily mean something done *cominus*. But it must imply personal violence; and I think that the matter justified by this plea is not a battery. The rule must be absolute.

Littledale, J. The argument for the plaintiff on the first point would go the length of saying that to shoot at a person and hit him would be no battery.

Patteson and Williams, Js., concurred.

Rule absolute.

[1] 1 Taunt. 357.
[2] 1 H. Bl. 291.
[3] Bull. N. P. 329. S. C. Sayer's Rep. 91.
[4] 7 Taunt. 689.

BARNES *v.* MARTIN AND ANOTHER.

Supreme Court of Wisconsin, 1862.

[*Reported in* 15 *Wis.* 240.]

ERROR to the Circuit Court for Walworth County.

This was an action by Peter J. Martin and Barbara, his wife, against Barnes, for an assault and battery upon the wife. The answer was: 1. A general denial. 2. That just before the time when, etc., said Barbara assaulted the defendant with a knife, and would have wounded him therewith, if he had not immediately defended himself, wherefore he did defend himself, unavoidably bruising her a little, but doing her no unnecessary injury. 3. That at the time when, etc., the defendant was possessed of a certain close, and of a certain cow then being therein, and that said Barbara, with force and arms, broke into said close, and endeavored to take away said cow, forcibly, with a strong hand, and would have so taken the same if he had not defended his possession thereof; wherefore he did defend the same, and resist the endeavor of the said Barbara, and that if any injury then and there happened to her, the same happened of her own wrong, etc. — The action was brought in Racine County, and was removed, on application of the defendant, to the Circuit Court for Walworth County. On the trial, the plaintiffs, for the purpose of showing the defendant's wealth, offered in evidence the affidavit made by him for the change of venue, which contained statements as to certain property owned by him in Racine County, and as to litigations concerning the same, in which he had for some years been involved with citizens of that county, in consequence of which he alleged that he could not have a fair trial therein. They also offered evidence tending to show, that in consequence of the injuries inflicted upon the female plaintiff by the defendant, she was obliged for some weeks to have medical attendance, and aid about her house-

hold work, etc. The defendant objected to each of these offers, but the court overruled the objections. The plaintiff Peter was admitted as a witness, against the objection of the defendants. The facts proved are sufficiently stated in the opinion of the court.

The defendant requested the court to instruct the jury as follows: 1. That if they should find that the cow was trespassing upon the defendant's lot at the time he took possession of her, then such possession was lawful; and the plaintiff Barbara had no right to take the cow out of the defendant's possession by force. 2. That if the jury should find that the cow was upon the defendant's lot at the time he took possession of her, then such possession was lawful under the law relating to estrays, and the plaintiff Barbara had no right to take the cow out of the possession of the defendant by force. 3. That the plaintiff Barbara had no right to take the cow out of the possession of the defendant by force. 4. That if the jury should find that the plaintiff Barbara intended by her acts, in order to obtain the cow, to commit violence upon, or menaced violence to, the defendant, with the butcher knife, then her acts on coming up to the defendant on the occasion referred to in the case, with the intention of executing her purpose, amounted to an assault first upon the defendant. 5. That if the jury should find that the plaintiff Barbara entered the defendant's lot by force or contrary to his direction, and intended by her acts to take the cow out of his possession by force, then he was justified in defending his possession of the lot and cow by force, provided the force was proportioned to the resistance. 6. That the jury had no right to find punitive or exemplary damages, unless they first found that the acts of the defendant in resisting the taking of the cow from him were governed by wanton or malicious motives, and were without apparent cause. 7. That if the jury should find that the plaintiff Peter J. Martin instructed the plaintiff Barbara not to cut the cow loose, then neither Barbara nor the plaintiff for her could

claim any more protection or right on her account than a stranger who should have been attempting to take forcible possession of the cow, could claim.

The court gave the first instruction asked, after modifying it by inserting the word "enclosed" before the word "lot," and adding at the end "whether his possession was lawful or unlawful." The court also gave the second instruction, with the addition "that the defendant must have clearly notified or sufficiently indicated to the owners on what ground he took up the cow, and it is left to the jury to say whether he notified the owner that he did take up the cow as an estray." The third, fifth, and seventh instructions were given, and the fourth and sixth refused.

The court further charged the jury that if they found for the plaintiffs they might give punitory damages against the defendant; and that if they found for the plaintiffs they might compensate them for mortification and injury of feelings, loss of time, and standing in society.

Verdict for the plaintiffs for $2,000. Motion for a new trial denied.

George B. Judd, for plaintiff in error:

1. The complaint does not allege special damages, as for employing assistance or nursing Barbara while it is claimed she was sick, for loss of service, medical attendance, etc. Hence the objection to the evidence relating to those subjects was well taken. Slack *v.* Brown, 13 Wend. 390; Strang *v.* Whitehead, 12 Wend. 64; Bogert *v.* Buckhalter, 2 Barb. 525; Birchard *v.* Booth, 4 Wis. 67. 2. The defendant's affidavit should not have been admitted in evidence. (1) It was offered and given in evidence entire, but only a part of it was competent to prove the fact for which it was offered. Most of it, though incompetent, was calculated to prejudice the minds of the jury against the defendants. (2) It was inadmissible for the purpose for which it was offered. Myers *v.* Malcolm, 6 Hill, 292, 293, 296 and note (*b*); Osgood *v.* Manhattan Co., 3 Cow. 612, 621; Strang *v.* Whitehead, 12 Wend. 64; Penfield *v.* Carpender, 13

Johns. 350; Irvine *v.* Cook, 15 id. 239; Haswell *v.* Bussing, 10 id. 128. 3. The husband, Peter, was incompetent as a witness. Pillow *v.* Bushnell, 5 Barb. (S. C.) 156; 1 Greenl. Ev. §§ 334–342. 4. As to the instructions to the jury, the court erred, — (1) In inserting the word "enclosed" in the first instruction asked by the defendant. (2) In the addition made to the second proposition. R. S., chap. 43, sec. 2; Harrison *v.* Brown, 5 Wis. 27. (3) In refusing the fourth instruction asked. Hays *v.* The People, 1 Hill, 351. (4) In refusing the sixth instruction. McWilliams *v.* Bragg, 3 Wis. 424, 429, 431. (5) In the charge as to punitive damages. Scribner *v.* Beach, 4 Denio, 448; Blake *v.* Jerome, 14 Johns. 406; Heermance *v.* Vernoy, 6 id. 5. (6) In charging the jury that if they found for the plaintiffs they "might compensate them for mortification and injury of feelings, loss of time, and standing in society." There is no foundation laid in the complaint for such damages. Moreover in such an action by husband and wife, if the jury find for the plaintiffs, they can recover only for the injury and suffering of the wife, and not for loss of service or expense to the husband. Thomas & Wife *v.* Winchester, 2 Seld. 397, 407; Lewis & Wife *v.* Babcock, 18 Johns. 443; 1 Chitty's Pl. 64. 5. The damages are excessive, and are such as to evince passion, partiality, or prejudice on the part of the jury. A new trial should have been granted. McConnell *v.* Hampton, 12 Johns. 234.

Cary & Pratt, for defendants in error:

1. The affidavit of Barnes was properly admitted in evidence, to show his wealth. (1) In an action for a malicious injury to the person, the jury may give exemplary or vindictive damages. 13 How. (U. S.) 363; 4 Duer, 247; 5 Watts, 375; 3 Wis. 424; 4 id. 67. (2) In giving such damages, a jury may take into consideration the wealth of the defendant, and testimony upon that point is admissible. 4 Duer, 247; 5 Watts, 275; 4 Wis. 67. (3) An admission in an action is conclusive in that proceeding, upon the party

making it. 2 Caines' R. 155. 2. Peter J. Martin had a right, under our statute, to testify in his own behalf; and the fact that Barbara, his wife, was a co-plaintiff could not affect this right. See R. S. p. 817, sec. 1, and p. 818, sec. 2. 3. The fourth instruction asked by the defendant was properly refused, for the reason that it required the judge to charge the jury that the acts of the plaintiff Barbara constituted an assault, instead of asking the judge to charge the jury as to what constituted in law an assault, and then leaving it to the jury to determine whether the acts of Barbara were or were not an assault. The fifth instruction, which was given by the court, contains the correct law relative to the rights of the defendant. 4. The sixth instruction was also properly refused. Damages were sought not for the defendant's acts "in resisting the taking of the cow," but for his acts in assaulting and beating the plaintiff Barbara. 5. The court properly charged the jury that "if they found for the plaintiff they might give punitory damages against the defendant." 3 Johns. 56; 3 Scam. 373; 6 Hill, 466; 5 Watts, 375; 2 Gilman, 432; 3 Wis. 424; 13 How. (U. S.) 363. 6. The last instruction given was correct. In all actions for injuries to person or reputation, a jury, in estimating the amount of damages, may take into consideration the loss of plaintiff's time; and where punitive damages are allowable, may also take into consideration the injury to feelings and public disgrace, affecting plaintiff's standing in society, occasioned by the infliction of the wrong. 2 Greenl. on Ev., § 267; 43 Maine, 163.

By the Court, DIXON, C. J. All the witnesses concur in saying that the plaintiff in error had taken up and was peaceably possessed of the cow at the time of the affray. The defendant in error, Barbara, came for and demanded that the cow be delivered up, which the plaintiff refused. She then went home, and soon afterward returned with a knife in her hand, avowing her purpose to take the cow by

force. The plaintiff resisted, and it was in the prosecution of this unlawful enterprise that she received her injuries. For whether the plaintiff was authorized to take up the cow, and might lawfully detain her or not, the defendant Barbara had no right to retake her by force. The law affords ample redress for all injuries of that kind, and will not justify parties in resorting to violence and breaking the public peace. The defendant was therefore acting in her own wrong in thus endeavoring to dispossess the plaintiff, and that whether his possession was lawful or unlawful. Under these circumstances, we think it clear that the judge should have given the fourth and sixth instructions asked by the plaintiff. It cannot be disputed, if the jury had found that the defendant in error, in order to obtain the cow, threatened and intended to commit violence upon the plaintiff with the knife, that her acts in coming up to him with the intention of executing such purpose would have amounted to an assault. Neither can it be claimed that vindictive damages should be given in such a case, unless the jury should find that the acts of the party resisting were without apparent cause, and proceeded from wanton or malicious motives. It would seem to be one of the clearest principles of justice, that a party resisting the forcible and unlawful act of another ought not to be punished by way of exemplary damages, unless he be guilty of excess, and act from motives of malice.

The judge was also wrong in charging the jury that if they found for the plaintiffs (defendants in error), they might give punitory damages. The facts did not warrant an instruction so broad and unqualified. He should have told them that their right to do so depended upon their finding the qualifying facts above stated.

The "loss of time" is no part of the injury for which compensation can be given in this action. The time and services of the wife belong to the husband, and for a loss of them he must sue alone. The joint action can only be brought for the personal suffering or injury to the wife. 1 Chitty's Pl. 73; 18 Johns. 443.

"Loss of standing in society" is a very vague and uncertain element of damage in a battery. If by it were meant circumstances of outrage and insult which wound the feelings and tend to lower the party aggrieved in the estimation of their fellow-citizens, it was well enough. But if, as was argued by counsel, it was intended that the jury might give compensation for any public odium which might arise from the exposure at the trial of the domestic quarrels of the defendants in error, then it was clearly wrong.

There was no error in receiving the affidavit of the plaintiff in error for the purpose of showing his wealth. If he had requested, no doubt the court would have limited the reading of it to such facts as pertained to that subject.

The husband, Peter J. Martin, was properly received as a witness. He was a party to the action, and not within the exceptions specified in the statute. R. S. p. 818, sec. 2. The legislature obviously intended that the rights of the parties to testify in their own behalf should be reciprocal, which would not be the case were one to be excluded because his or her husband or wife happened also to be a necessary party. The legislature have made no such exceptions, and we cannot. Neither can we see any motives of policy which should forbid their giving evidence in such cases. Marsh *v.* Potter, 30 Barb. 506; Babbott *v.* Thomas, 31 id. 277; Lockhart *v.* Luker, 36 Miss. 68.

Judgment reversed, and a new trial awarded.[1]

PETER ABT *v.* MINNIE BURGHEIM.

Supreme Court of Illinois, 1875.

[*Reported in* 80 *Ill.* 92.]

APPEAL from the Superior Court of Cook County; the HON. JOSEPH E. GARY, Judge, presiding.

Messrs. Brandt & Hoffmann, for the appellant.

Messrs. E. & A. Van Buren, for the appellee.

[1] See Wam. St. Cas. §§ 22–26.

Mr. Justice Scholfield delivered the opinion of the court: —

This was an action of trespass, by appellee, against appellant, for assault and battery.

Appellant pleaded, first, not guilty; second, *son assault demesne;* third, that he was the keeper of a public house, and appellee came therein, and made a loud noise and disturbance, and annoyed the guests, etc.; that appellant requested her to desist, but she refused, and appellant gently removed her, etc.

It was stipulated that all evidence admissible under any proper special replications to the second and third pleas might be given in evidence by appellee, without specially replying to those pleas.

The jury returned a verdict in favor of appellee, assessing her damages at $250, upon which the court, after overruling a motion for a new trial, gave judgment.

In the conflicting state of the evidence, it will be unnecessary to spend much time in considering the question whether the evidence sustains the verdict.

Appellant was occupying the upper rooms of a house on Canal Street, in Chicago, as a hotel, and a room therein, on the ground-floor, as a bar-room. Appellee's husband occupied a store-room on the same floor, between which and appellant's bar-room was a common hall, accessible by doors from each room.

On the 4th of July, 1874, appellee's children, together with others, were playing in this hall, and were driven out by appellant. Whether he inflicted violence on them or not, is uncertain. He says he did not. They went crying, however, to their mother, appellee, saying he had slapped them, and she became angry, and, no doubt, was somewhat abusive and insulting to him. That he put her out of his bar-room violently, is not disputed. She swears he struck her twice with his fist, — the last time knocking out two of her teeth, bruising her face and prostrating her, in an insensible condition, on the steps of a stairway in the hall.

She is corroborated, as to his striking her twice with his fist, by another lady who witnessed a part of their difficulty, and also by one of appellant's witnesses, August Deege. Appellant's denial of using his fist is not very satisfactory. He says he gave her a push, but don't know whether he *struck her in the face* or not, thus, by implication, admitting a striking.

Appellee was considerably injured, and we are unable to say, from the evidence, appellant used no more force than was reasonably necessary, even if we shall concede he was justified in using force at all. We do not feel warranted in disturbing the judgment, either on the ground that the jury were actuated by passion or prejudice, or that they misapprehended the effect of the evidence.

Appellant asked the court to give the following instructions, which were refused, and their refusal is assigned for error: —

"1. The jury are instructed that if they believe, from the evidence, that, upon the day mentioned in the declaration, the plaintiff, Burgheim, came upon the premises of the defendant in an excited and disorderly manner, and, while there, used indecent language, and finally struck the defendant, Abt, in the face, then the defendant was legally authorized to eject the plaintiff from his premises, and was justified in using all the force necessary in putting the plaintiff out of his house, and was not guilty of an assault and battery in so doing.

"2. The jury are instructed, as a matter of law, that if they believe, from the evidence, that the plaintiff forcibly entered the premises of the defendant, and assaulted and beat the defendant, he was justified in opposing force to force, even to a wounding, or mayhem, in self-defence.

"3. The jury are instructed that if they believe, from the evidence, that the plaintiff, Burgheim, came upon the premises of the defendant in a defiant and noisy manner, and, while in defendant Abt's house, committed an assault and battery upon defendant, then the defendant was not

obliged to request or ask plaintiff, Burgheim, to leave his house or premises, but had a legal right immediately to eject or put out the plaintiff, and use all necessary force for that purpose; then they should find the defendant not guilty."

These instructions were properly refused. Even if appellee did forcibly enter the premises of appellant, or, while therein, did use indecent and abusive language towards appellant, or did commit an assault and battery upon him, he was only justified in using such force as was reasonably necessary, under the circumstances, to defend himself and expel her from his premises; and if, in so doing, he used more force than was reasonably necessary under the circumstances, he was liable in the present action for the damages thereby done to appellee. The indispensable element of the reasonableness of the force allowed to repel a personal assault or an unlawful invasion of premises, is wholly omitted from each of the instructions as asked, and the second expressly recognizes the right of the party to use any amount of force, without any restrictions whatever.

We see no cause to disturb the judgment, and it is accordingly affirmed.

Judgment affirmed.

SAMUEL S. JOHNSON, Appellant, *v.* AARON McCONNEL, Respondent.

Supreme Court of New York, Fourth Department, 1878.

[*Reported in* 15 *Hun*, 293.]

APPEAL from a judgment in favor of the defendant, entered upon the verdict of a jury at the Steuben Circuit.

McMasters & Parkhurst, for the appellant. If defendant justifies assault and battery, on the ground of lawful authority, the burden of proof is upon him to show that he did not use more force than was necessary. Hilliard on

Torts, vol. 1, p. 198, id. p. 82; Loring *v.* Aborn, 4 Cush. 608; Imason *v.* Cope, 5 C. & P. 193; Simpson *v.* Morris, 4 Taunt. 821; Hannen *v.* Edes, 15 Mass. 347; 1 Wharton Ev. § 358; Brackett *v.* Hayden, 15 Maine, 347; Gaul *v.* Fleming, 10 Ind. 253; Treadwell *v.* Joseph, 1 Sumn. 390. An assault and battery need not be unwarranted or committed in anger. A battery is "the actual infliction of violence upon the person of another." Hilliard on Torts, p. 191; 2 Greenleaf, § 84. It may result from carelessness or be done in the best of humor, and yet be assault. As to shave a man's head against his will. Ford *v.* Skinner, 4 C. & P. p. 239; 1 Hilliard on Torts, 189 and 193, note; Bullock *v.* Babcock, 3 Wend. 391. Or taking indecent liberties with a female pupil or patient, though unresisted. Rex *v.* Rosinski, Ry. and M. 19; 2d Greenleaf Ev. § 82; Hays *v.* People, 1 Hill, 351. And consent to the act of assault is no bar to the recovery. Adams *v.* Waggoner, 5 Am. R. 230.

Ruggles & Little, for the respondent.

TALCOTT, P. J.:

This is an appeal from a judgment rendered on the verdict of a jury, for the defendant, at the Circuit in Steuben County.

The action is for assault and battery in the course of which the plaintiff's leg was broken, and he was otherwise seriously injured.

At the time of the assault, the plaintiff was tending bar at Jones' Hotel, in the town of Howard, in Steuben County, during the absence of Jones, the proprietor. The plaintiff was addicted to occasional intemperance. Before Jones left home on this occasion, he requested one Lane, a neighbor, in case the plaintiff, Johnson, got intoxicated, that he should come to the hotel and assist in carrying on the business.

Johnson did become intoxicated during the absence of Jones, and continued to be more or less so during sev-

eral days, and used violent language towards Lane,and told him when he was at the tavern to go home and mind his own business. Lane then went and saw the defendant, McConnel, another neighbor, and requested him to go down to the tavern, and, as the defendant testifies, talk with the plaintiff. The defendant did go to the tavern, and while there an altercation arose between Lane and the plaintiff, and they were engaged in a scuffle, in which the defendant interfered. The plaintiff undertook to resist such interference, and a scuffle took place between the plaintiff and the defendant, in the course of which the plaintiff received the injuries in question. The defendant claimed that he merely interfered to keep the plaintiff quiet, and with no design to injure him, and that the breaking of the plaintiff's leg, and the other injuries received by him, were entirely accidental.

Among other things, the defendant testified that he was not irritated at all, and had full control of himself during the scuffle between himself and the plaintiff.

There was the usual conflict of evidence as to what occurred, and what was said between the parties at the time of the occurrence; and, among other things, the justice before whom the cause was tried, at the Circuit, instructed the jury that "an assault and battery must be an angry and unwarranted attack upon another individual. You are to judge of all the circumstances of the case, whether that was unwarrantable in view of the condition in which the plaintiff was. If it was unwarrantable, the plaintiff is entitled to damages; if it was merely for the purpose of keeping him quiet, and no harm was intended and none was done, he is not entitled to recover for it." The counsel for the plaintiff excepted to the charge that to constitute an assault and battery, it must be in anger and unwarranted, and asked the court to charge that neither of those elements were necessary to constitute an assault and battery. The court refused so to charge, and the plaintiff excepted.

Of course, in order to constitute an assault and battery, for which a party is liable in damages, the assault must be unwarranted; but it need not, in order to render the defendant liable, have been committed in anger. Hilliard on Torts, 189, 193, note; Bullock *v.* Babcock, 3 Wend. 391.

Though there might be a technical answer to the plaintiff's exception, growing out of the form in which it was taken, and also one founded on a critical examination of the language of the justice, in his charge; yet we think there is a strong probability that the jury was misled by the charge, and may have been induced thereby to suppose that, in order to constitute an assault and battery, for which the defendant was liable in damages, the assault must have been made in anger; and, if done in entire good-nature, and from good motives, though against the will of the person assaulted, the defendant could not be held liable; and we think, on the whole, there should be a new trial in the case, by reason of the apparent possibility that the jury may have been misled, as to the rule of law applicable to the case, by the charge of the judge, in connection with the refusal to charge as specified.

Judgment should be reversed and a new trial ordered, costs to abide the event.

Present — TALCOTT, P. J., SMITH and HARDIN, JJ.

Judgment reversed and new trial ordered, costs to abide event.[1]

JAMES FITZGERALD *v.* JAMES B. FITZGERALD.

Supreme Court of Vermont, 1879.

[*Reported in* 51 *Vt.* 420.]

TRESPASS for assault and battery. Pleas, general issue and *son assault demesne.* Replication, *de injuria*, and joinder. Trial by jury, September Term, 1878, DUNTON, J., presiding.

[1] See Wam. St. Cas. § 63.

The plaintiff's testimony tended to show that at the time of the commission of the wrong complained of, he was plastering at the house of one Fitzgerald, in Rutland, when the defendant, who was the plaintiff's nephew, came in to inquire about getting sand to plaster his house, whereupon conversation ensued wherein the plaintiff accused the defendant of taking his letters from the post-office, which the defendant denied, saying that he had a post-office box of his own, and had a middle name; that the plaintiff replied that the middle name was for his mother's people, and that they were a bastardly breed; and that the defendant thereupon seized him and beat him severely, striking him on the head and leg with a piece of board, and otherwise injuring him. The plaintiff admitted that he had been drinking, but denied that he had drank to excess. The defendant's testimony tended to show that after the conversation had gone on as detailed by the plaintiff, the defendant replying with some spirit, the plaintiff became angry and began to throw mortar at the defendant; that the defendant thereupon seized him and held him awhile; that afterwards when they had become separated and when the plaintiff was throwing mortar at him, he threw a piece of inch board a foot square at the plaintiff, hitting him on the leg. The defendant further testified that the plaintiff had been drinking freely and was much excited; denied assaulting the plaintiff, saying that whatever beating he gave the plaintiff he gave in reasonable self-defence, and after the assault made by the plaintiff as already stated. The court charged as to the burden of proof that under the general issue the burden was on the plaintiff to show that he was assaulted by the defendant, and further as follows: "The defendant admits that he assaulted the plaintiff, but under his plea, he says the plaintiff actually committed the first assault, and that what was thereupon done by him was in the necessary defence of his person. The burden of proof is upon the defendant, under this plea, to show that the plaintiff committed the first assault, and that what was done by

him (defendant) was done in the necessary defence of his person." To that portion of the charge the defendant excepted.

L. W. Redington and *P. R. Kendall*, for the defendant:

The charge was erroneous. The defendant did not admit an assault. The acts to which he testified did not constitute an assault. Bouv. Law Dict., title, Assault, 3 Bl. Com. 120; 2 Hawk. P. C. s. 62. The error may have misled the jury. At any rate, if the ruling was wrong it cannot be assumed that there was anything in the case to correct it. Johnson *v.* Burden, 40 Vt. 567; Brothers *v.* Morris, 49 Vt. 460.

W. G. Veazey and *J. B. Phelps*, for the plaintiff:

Under the plea of *son assault* the burden was on the defendant. 2 Greenl. Ev. s. 95; 1 Chit. Pl. 501, 508, 509, 592; 3 Chit. Pl. 1067, note; 2 Phil. Ev. Cowen & Hill's notes, 810, note 220; 812, 818, note 223; Blood *v.* Adams, 33 Vt. 52; Loring *v.* Aborn, 4 Cush. 608; Burnham *v.* Allen, 1 Gray, 496. Under the old English practice, the defendant would have had a right to go ahead at the trial. Redell *v.* Russell, Ryan & Moody, N. P. 293; Fish *v.* Travers, 3 C. & P. 578.

The opinion of the court was delivered by

BARRETT, J. It is agreed that defendant has the burden of maintaining his plea of *son assault*. The defendant admitted seizing hold of plaintiff, and holding him awhile, and that afterwards, when they had become separated, and plaintiff was throwing mortar at him, he threw a piece of board at him, hitting him on the leg.

Those acts, thus admitted, were an assault and battery. Every battery includes an assault, is a maxim — though every assault does not include a battery. The court was literally and technically correct in saying in the charge that defendant admits that he assaulted the plaintiff. The rest of the extract from the charge is not criticised, as it could not well be. The court committed no error in the matter excepted

to. It may be proper to add that, to the ordinary mind, the technical distinction between a simple assault and an assault by a battery, is not very obvious or well understood, and when in common or professional parlance it is said that one person has assaulted another, the idea conveyed is, that the one person has inflicted some actual violence upon the person of another — not having merely made a fear-inspiring demonstration of violence, without in fact inflicting it. However this may be in the general, in this particular case the use of the word "assault," if understood in its restricted technical sense by the jury, would indicate a less injurious and damaging act on the part of the defendant than if the term "battery" or "beating" had been used.

Judgment affirmed.

JOHN CLARK *v.* OSCAR DOWNING.

Supreme Court of Vermont, 1882.

[*Reported in* 55 *Vt.* 259.]

1. Action, trespass; pleas, — 1st, general issue; 2d, *son assault demesne;* 3d, defence of defendant's possession. Replication to the 2d and 3d pleas *de injuria,* without justification under a search-warrant. *Held,* that the search-warrant was not admissible evidence.

2. It may be an assault if one strike a horse attached to a wagon in which another person is sitting.

Trespass for assault and battery. Pleas, — 1st, general issue; 2d, *son assault demesne;* 3d, defence of the defendant's possession. Trial by jury, December Term, Orange County, POWERS, J., presiding. Verdict for the defendant. The third plea set forth that the plaintiff's horse was wrongfully in and upon the defendant's land doing damage, etc.; that the defendant requested the plaintiff to take away and remove the horse; that the plaintiff refused so to

do; that the said beating of the horse, etc., was done in defence of his said land, in order to remove said horse, doing no unnecessary damage. Replication to the second and third pleas *de injuria*, without justification under a search-warrant. On trial, the plaintiff's evidence tended to show that five turkeys had been stolen from his barn on the night before the 23d of August, 1880; that the plaintiff had reason to believe and did believe that the defendant had stolen them; that he procured a search-warrant in due form of law, and put it into the hands of a sheriff to serve; that the sheriff took the plaintiff and his two daughters with him to identify the property if found, and went to the defendant's house; that the defendant upon their arrival invited the plaintiff and his daughters into the house; that plaintiff did not go in, but hitched his horse to the fence near the house; that the sheriff informed the defendant what his business was, and at this he became enraged at the plaintiff, and used violent language towards him; that the sheriff, plaintiff, and defendant went in company to the defendant's barn-yard, and then the defendant refused to allow the plaintiff to aid in searching his barn with the officer. Upon this the plaintiff inquired of the officer if he had not a right to be there to identify his property. The officer then told him to go back to his team. He did so; and in about thirty minutes the defendant and sheriff went down where the plaintiff was, and immediately the defendant caught hold of the plaintiff's shoulder, twitched him around, and threw him down upon the ground. At this time the defendant's wife came out of the house, took hold of her husband, and told him not to hurt the plaintiff. Whereupon the defendant told him to leave his premises; and the plaintiff replied that he would as soon as he could; and he immediately started for his horse, unhitched it, and he and his daughters got into the wagon, and were going away, when the defendant caught hold of the horse, kicked it, and struck it over the back several times with a board. The defendant's evidence tended to show that he ordered

the plaintiff away from his premises before he went to the barn, and to contradict the plaintiff's testimony. The plaintiff offered said search-warrant and officer's return; to the admission of which the defendant objected, on the ground that the plaintiff did not plead it in justification; and the court excluded it. The plaintiff requested the court to charge the jury, that if they found that when the defendant ordered the plaintiff to leave, and he was using all reasonable diligence to leave, and had got into his wagon with his daughters, and was going away, and the defendant, while the plaintiff was in the wagon and in the act of leaving the defendant's premises, did strike the plaintiff's horse, as plaintiff's testimony tended to show, this would be an assault upon the plaintiff, for which he would be entitled to recover. The court refused so to charge, but did charge that beating the horse was an aggravation of the assault upon the plaintiff, if he was assaulted; but as an independent act, it was not a personal assault for which alone recovery could be had; that under the declaration recovery could be had for beating the horse only in case the jury found the plaintiff was personally assaulted.

A. M. Dickey and *G. A. Dickey*, for the plaintiff:

The court erred in charging the jury. Striking the horse was an assault. Hilliard, Torts (4th ed.) 192. Striking one's cane while in his hand is an assault. 3 C. & P. 373; 1 Dall. 123; 1 Hill (N. Y.), 46.

R. M. Harvey and *J. R. Darling*, for the defendant:

The search-warrant under the pleadings not admissible. 52 Vt. 645; 47 Vt. 717; 2 Wm. Bl. 1165; 5 Cow. 181; 12 Mass. 505. Striking the horse not an assault. 22 Barb. 94; 43 Ind. 146.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of trespass for an assault and battery. The first exception taken was to the ruling of the court excluding the search-warrant as evidence. The plaintiff claims that under his replication of *de injuria* it was admissible.

The replication of *de injuria* puts in issue all the material allegations of the plea. If the plaintiff wished to avail himself of the search-warrant as a justification, he should have alleged it in his replication, so that an issue might have been made upon that allegation. There was no error in excluding it. Chit. Pl. 564; George *v.* West, 52 Vt. 645; Braley *v.* Walworth and Burnham, 47 Vt. 717.

The only other exception taken was to the refusal of the court to charge as requested. The evidence referred to in the exceptions, and upon which the request was predicated, and the question of what in law constitutes an assault, have to be considered in deciding whether the request should have been complied with or not. It appears that the evidence as to what transpired at the time and upon the occasion when it was claimed that the assault was committed was conflicting, and the request was based upon the supposition that the jury might find the facts as the plaintiff's evidence tended to show.

Admitting that the jury might so find, did the striking of the plaintiff's horse constitute an assault upon the plaintiff? It is not necessary to constitute an assault that any actual violence be done to the person. If the party threatening the assault have the ability, means, and apparent intention to carry his threat into execution, it may in law constitute an assault. The disposition, accompanied with a present ability to use violence, has been held to amount to an assault. Where violence is used, it is not indispensably necessary that it should be to the person. It was decided in Hopper *v.* Reeve, 7 Taunt. 698, that the upsetting of a chair or carriage in which a person was sitting was an assault; in Morton *v.* Shoppee, 3 C. & P. 373, that riding after a person at a quick pace and compelling him to run into his garden to avoid being beaten was an assault; that the striking of the horse upon which the wife of the plaintiff was riding was an assault upon the wife. 1 Stephens, N. P. 210.

An assault is defined in Hays *v.* The People, 1 Hill, 351,

to be an attempt with force or violence to do a corporal injury to another. The striking of the plaintiff's horse in the manner that his evidence tended to show would probably result in a corporal injury to him; hence, the request should have been complied with.

The case should have been submitted to the jury for them to find whether the striking was as the plaintiff claimed it to have been, or in the manner and for the reasons indicated in the defendant's plea.

Judgment reversed, and cause remanded.

CORCORAN *v.* HARRAN.

Supreme Court of Wisconsin, 1882.

[*Reported in* 55 *Wis.* 120.]

APPEAL from the Circuit Court for Kewaunee County.

This was a civil action for an assault and battery, and was commenced in justice's court, where plaintiff recovered a judgment for $100 damages. Defendant appealed to the Circuit Court. On the trial there, certain portions of the instructions given to the jury were excepted to by the defendant. Two of these portions are fully recited in the opinion. The others were as follows: (3) "You should consider the case fairly and candidly, and give the plaintiff such amount as you think reasonable and just under the circumstances." (4) "If you believe that the assault was committed by the defendant wilfully and maliciously, you ought to give such damages, in addition to a full compensation for the injury received, as in your opinion will be sufficient to punish the defendant and deter others from such wrong." The jury awarded the plaintiff $200 damages. Defendant having moved for a new trial, the Circuit Court permitted plaintiff to remit $100 from the amount of the verdict, and thereupon denied the motion. From a judgment entered in plaintiff's favor for $100 damages, the defendant appealed.

For the appellant there was a brief by *Hudd & Wigman*, and oral argument by *Mr. Hudd.*

For the respondent the cause was submitted on the briefs of *Tracy & Bailey.*

CASSODAY, J. 1. It is urged as error that the court, among other things, charged the jury that "personal abuse, which may have had something to do with inducing and bringing upon another an assault, may be considered by a jury in mitigation of damages. But a man commencing an assault and battery under such circumstances is liable for the actual damages which result from such assault. The abusing words are no justification for the blows, and may be considered, as I have said, in mitigation of damages, but not actual damages." This portion of the charge is clearly within the rule recognized and followed in Fenelon *v.* Butts, 53 Wis. 344, where it was held, that: "7. It is the settled law of this State that, while proof of defendant's good faith is admissible to mitigate punitory damages, it cannot be considered to mitigate compensatory damages, including those allowed for injury to the feelings."

2. It is also urged as error that the court, among other things, charged the jury as follows: "In this case the plaintiff must recover. The only question which you have further to consider is, How much, under the circumstances, shall it be? He is entitled to recover, *first*, the actual damages which the evidence shows he has sustained for his loss of time, and the pain and suffering which were the result of such assault; and *second*, in addition to such actual damages, such sum as in your judgment is reasonable and just by way of punishment, as an example to the defendant and others, to deter him and others from committing such acts." Had this portion of the charge been excepted to on the ground that the court directed the jury to give the plaintiff punitive damages in addition to actual damages, we probably would have sustained it; but no such exception was taken. The language used in the exception

is this: "The defendant excepts to so much of the charge as reads [here quoting the same], and each and every part thereof, because it is very improper in not distinguishing pain and suffering from the actual damage; and in the effect of the same, this further damage, viz., pain and suffering, defendant could not have the benefit of the mitigating circumstances if any existed." So far as this exception is general in its terms, it must be disregarded, for the simple reason that the portion of the charge quoted which relates to actual damages was substantially correct, and it is well settled that a general exception to a portion of a charge embracing more than one proposition is of no avail on review if any one of the propositions is correct. Butler *v.* Carns, 37 Wis. 61; Sabine *v.* Fisher, 37 Wis. 376; Nisbet *v.* Gill, 38 Wis. 657. But this exception is based wholly on the ground that the court failed to distinguish pain and suffering from actual damage, and thereby prevented the defendant from having the benefit of reducing the amount of the damages arising from pain and suffering by mitigating circumstances. But that is the very question determined adversely to the defendant in Fenelon *v.* Butts, *supra*. It is there held that they are not distinguishable. We must therefore hold that where an exception to a portion of a charge expressly states the ground upon which it is made, it must be treated as a special exception upon the ground stated; and where such exception is stated to be upon one ground, which cannot be sustained, it will not be enlarged and extended so as to serve as an exception upon another and different ground which might have been sustained. Miles *v.* Ogden, 54 Wis. 573.

Where an exception is to a portion of a charge quoted, and to each and every part thereof, upon a particular ground specified, it will be held inoperative except as to the ground particularly specified. Yates *v.* Bachley, 33 Wis. 185.

3. The same observations are applicable to the third exception to a portion of the charge, and particularly to

the fourth exception to a portion of the charge which may have been subject to the objection of directing punitive damages in addition to compensatory damages, had the same been excepted to on that ground. Each of these two portions of the charge may be regarded as somewhat general in its terms, but we do not think that either is obnoxious to the criticism that it gave the jury liberty to find a verdict according to their own notions of right and wrong, regardless of the evidence in the case. On the contrary, we think the jury were bound by their oaths to regard what was said to them by the court in his charge as having reference only to the case, and the evidence given therein on the trial before them. Certainly, if the defendant desired more definite instructions, he should have so requested; and, not having done so, he cannot be heard to complain without exception on the ground that the portion of the charge given was indefinite and uncertain. Trowbridge *v.* Sickler, 54 Wis. 306; Stilling *v.* Town of Thorp, id. 528. It is true, as stated by counsel, that the court nowhere told the jury that punitive damages might be wholly defeated; but it is also true that the court was not requested so to charge, and hence, for the reasons given, such omission is not ground for reversal.

4. The court had charged the jury that "the fact that fines have been imposed, and he (the defendant) has been punished by the State, may be taken into consideration by the jury in mitigation of the damages;" and counsel urge that the portion of the charge respecting punitive damages left it doubtful where the reduction would come in for fines and punishment already had for the same offence. But, as already indicated, the best method of preventing the jury from being misled by a doubtful portion of a charge is to request an instruction upon the subject which is not doubtful. Besides, it has been held by courts entitled to great respect that "the imposition of a fine in a criminal proceeding for assault and battery will not bar or mitigate the party's liability to exemplary damages in a civil suit

for the same act." Hoodley *v.* Watson, 45 Vt. 289; Cook *v.* Ellis, 6 Hill, 466; McWilliams *v.* Bragg, 3 Wis. 424; Brown *v.* Swineford, 44 Wis. 282. This ruling, however, is merely suggested, as the question is not necessarily before us for consideration.

5. Should the judgment be reversed because the plaintiff, on the defendant's motion for a new trial for excessive damages, was allowed to remit $100 from the amount of the verdict, and have judgment for the balance, with costs? In urging that the court had no such power, counsel cite, among other cases, Potter *v.* Railway, 22 Wis. 619; Goodno *v.* Oshkosh, 28 Wis. 306; Nudd *v.* Wells, 11 Wis. 415. In Potter *v.* Railway, the trial court refused to set aside the verdict, and this court was asked to allow the plaintiff to remit whatever should be deemed an excess of damages; but it declined to exercise any such power, and sent the cause back for a new trial, with certain advisory remarks. The same course was followed in Goodno *v.* Oshkosh. See also Bass *v.* Railway, 39 Wis. 636; Page *v.* Sumpter, 53 Wis. 652; Cassin *v.* Delany, 38 N. Y. 178. But that question is not in this case; for here the deduction was allowed by the trial court. The right to allow such deduction in cases where the amount could be readily ascertained from the evidence with certainty, would not, we presume, be questioned; but whether the power exists in actions of tort, where the amount which should be deducted cannot be ascertained with any degree of certainty, is a question upon which the authorities are by no means uniform.

Nudd *v.* Wells, *supra*, was an action against an express company to recover damages for the non-delivery of a box of machinery, and the plaintiff obtained a verdict of $1,087; and a motion to set aside the verdict and for a new trial was granted, unless the plaintiff consented to reduce the verdict to $821.21, which he did, and judgment was entered thereon accordingly, and the defendant appealed to this court. In giving the opinion of the court, MR. JUSTICE PAINE said: "The practice of remitting where the illegal part is clearly

distinguishable from the rest, and may be ascertained by the court without assuming the functions of the jury and substituting its judgment for theirs, is well settled. . . . But it ought not to be carried so far as to allow the court, when a jury has obviously mistaken the law or the evidence, and rendered a verdict which ought not to stand, to substitute its own judgment for theirs, and, after determining upon the evidence what amount ought to be allowed, allow the plaintiff to remit the excess, and then refuse a new trial." And then, after conceding that there were two authorities (Collins *v.* Railway, 12 Barb. 492, and Clapp *v.* Railway, 19 Barb. 461), sustaining that view, and expressing some doubt as to whether there was any evidence that the value was the precise sum named by the court, he continued: "But without determining whether the court might properly have done this (determine the true value of the machine) consistently with the rule above laid down, we think it was mistaken in the rule of damages which it finally allowed." Thereupon the court reversed the cause upon other grounds, and hence the question suggested was not determined.

In Blunt *v.* Little, 3 Mason, 102, the plaintiff obtained a verdict of $2,000 in an action for malicious arrest, and on motion for a new trial on the ground that the damages were excessive, MR. JUSTICE STORY, before whom the cause was tried, said: "After full reflection, I am of opinion that it is reasonable that the cause should be submitted to another jury unless the plaintiff is willing to remit $500 of his damages. If he does, the court ought not to interfere farther." Page 107. A similar practice was followed in Diblin *v.* Murphy, 3 Sandford, 19; Collins *v.* Railway Co., 12 Barb. 492; Clapp *v.* Railroad Co., 19 Barb. 461; Murray *v.* Railroad Co., 47 Barb. 196; McIntyre *v.* Railroad Co., 47 Barb. 515; Sears *v.* Conover, 3 Keyes, 113; Hayden *v.* F. S. M. Co., 54 N. Y. 221; Whitehead *v.* Kennedy, 69 N. Y. 462; Doyle *v.* Dixon, 97 Mass. 208; Woodruff *v.* Richardson, 20 Conn. 238; Jewell *v.* Gage, 42 Me. 247; Belknap *v.* Rail-

road, 49 N. H. 358; Durkes *v.* Town of Union, 38 N. J. L. 23; Yeager *v.* Weaver, 64 Pa. St. 425; Pendleton Street Railway Co. *v.* Rahmann, 22 Ohio St. 446; I. C. R. Co. *v.* Ebert, 74 Ill. 399; Lombard *v.* Railway Co., 47 Iowa, 494; Collins *v.* Council Bluffs, 35 Iowa, 432; Kinsey *v.* Wallace, 36 Cal. 462; Guerry *v.* Kerton, 2 Rich. 507; Young *v.* Englehard, 1 How. (Miss.) 19; Davidson *v.* Molyneux, 17 L. T. R. 289. These cases were mostly actions for tort. In some of them the reduction was allowed by the appellate court, but that would seem to be extending instead of limiting the rule. The reasoning in some of these cases would seem to be unanswerable. We shall make no attempt to add anything. The practice adopted by the trial judge is clearly sanctioned by the great weight of authority. We must therefore hold that, in actions of tort as well as contract, where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, and in case he does so order the verdict to stand for the residue. Certainly the practice will tend to promote justice and lessen the expense to litigants and the public. Besides, the allowance of such option is no more of an exercise of arbitrary power by the trial judge than it would be for him to set aside the verdict absolutely upon the sole ground that it is excessive, and then, in effect, direct a jury to bring in a verdict for a smaller sum, but not in excess of an amount named by the court.

But we are unwilling to say that the verdict, as returned in this case, was so excessive as to authorize the interference of this court. To authorize such interference it should appear from the evidence, to use the language of Mr. Sedgwick, that "the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance. But this power is very sparingly used, and never except in a clear case." 2 Sedg. Dam. (601), 652. See Bowe *v.* Rogers, 50 Wis. 602. Since this is so, it is evident that the reduction was a favor to the

defendant, of which he has no right to complain. Certainly a party against whom a judgment has been recovered cannot reverse it on the ground that it is less than it should have been. Bammessel *v.* Ins. Co., 43 Wis. 463. Even in case of error, the judgment will not be reversed unless the error is such as might have prejudiced the appellant. Jones *v.* Parish, 1 Pin. 494; Green *v.* Gilbert, 21 Wis. 395; Balliet *v.* Scott, 32 Wis. 174; Irish *v.* Dean, 39 Wis. 562.

For the reasons given, the judgment of the Circuit Court must be affirmed.

By the Court. — *Judgment affirmed.*[1]

BARHOLT *v.* WRIGHT.

Supreme Court of Ohio, 1887.

[*Reported in* 45 *Ohio St.* 177.]

Error to the Circuit Court of Portage County.

THE plaintiff below brought suit against the defendant to recover damages for an assault and battery committed upon his person. The answer was a general denial. Upon the trial of the issue, the jury, under the charge of the court, rendered a verdict for the defendant. A motion for a new trial, assigning error in the charge, was overruled by the court, and a bill of exceptions taken. Upon error the judgment was reversed in the Circuit Court, and the cause remanded for a new trial; and the defendant below now prosecutes error in this court to reverse the judgment of the Circuit Court.

The evidence is not set out in the bill of exceptions; but it appears from the bill, that, upon the trial, the plaintiff offered evidence tending to show that he and the defendant went out to fight by agreement, and did fight, and was severely injured by the defendant; among other injuries inflicted upon him, one of his fingers was so bitten by the

[1] Compare Donnelly *v.* Harris, 41 Ill. 126 (1866).

defendant that it had to be amputated. By reason of the injuries so received, he became ill, was disabled for work for a long time, and was put to considerable expense in being cured. The court, however, charged the jury that if the parties went out to fight by agreement, and the plaintiff received the injuries complained of from the defendant while the fight was going on and in the course of it, he could not recover. The accuracy of this charge is the question presented by the record.

P. B. Conant and *J. N. Nichols*, for plaintiff in error.

W. B. Thomas, *George F. Robinson*, and *Cole & Wright*, for defendant in error.

MINSHALL, J. It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred by an agreement between the parties to fight. Thus in cases for damages resulting from the clearest negligence on the part of the defendant, a recovery is denied the plaintiff, if it appear that his own fault in any way contributed to the injury of which he complains. And a maxim, as old as the law, *volenti non fit injuria*, forbids a recovery by a plaintiff where it appears that the ground of his complaint had been induced by that to which he had assented; for, in judgment of law, that to which a party assents is not deemed an injury. Broom's Leg. Max. 268.

But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind

it no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement may be shown in mitigation of damages. 2 Greenleaf Ev. § 85; Logan *v.* Austin, 1 Stewart, 476. This, however, is the full extent to which the cases have gone. We will notice a few of them. In Boulter *v.* Clark, an early case, an offer was made, under the general issue, to show that the plaintiff and the defendant fought by consent. The offer was denied; the Chief Baron saying, "the fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action." Buller's Nisi Prius, 16. A number of earlier cases were cited, and among them that of Mathew *v.* Ollerton, Comb. 218, where it is said "that if a man license another to beat him, such license is void, because it is against the peace." It will be found upon examination that this case was not for an assault and battery; it was on an award that had been made by the plaintiff on a submission to himself. The remark, however, made in the reasoning of the court, is evidence of the common understanding of the law at that early day. In 1 Stephen's Nisi Prius, 211, it is said: "If two men engage in a boxing match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury." So in Bell *v.* Hansley, 3 Jones, N. C. 131, it was held that "one may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply." The following cases are to the same effect. Stout *v.* Wren, 1 Hawks, 420; Adams *v.* Waggoner, 33 Ind. 531; Shay *v.* Thompson, 59 Wis. 540; Logan *v.* Austin, 1 Stewart, 476. And so it was held in Commonwealth *v.* Collberg, 119 Mass. 350, that where

two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or mutual ill-will. Champer *v.* State, 14 Ohio St. 437, is not in conflict with this, as will be explained hereafter.

No case has been cited that can be said to be to the contrary. What is said by Peck, J., in Smith *v.* State, 12 Ohio St. 466, that "an assault upon a consenting party would seem to be a legal absurdity," must be applied to the facts of that case. The judge was discussing the sufficiency of a count in an indictment for an assault with intent to commit a rape, without an averment that it was made forcibly and against the will of the female. The absence of consent is essential to the crime of rape, or of an assault with intent to commit a rape, where the female has arrived at the age at which consent may be given. Intercourse, because illicit, does not amount to an assault where the female consents, however wrong it may be in morals. This is all that was meant by the learned judge in using the language quoted from his opinion.

In all such cases the consent of the female would, without doubt, be a bar to any right she would otherwise have to maintain an action for an assault and battery. It is said by Judge Cooley in his work on Torts, p. 163, that "consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. . . . A man may not even complain of the adultery of his wife, which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone." "But," he adds, "in case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds. . . . The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which

assent is given is matter of indifference to public order." See also, to like effect, Pollock on Torts, 139.

Neither is the case of Champer *v.* State, 14 Ohio St. 437, at variance with the principle upon which the plaintiff below seeks a recovery. The case seems to have been somewhat misapprehended by the courts of some of the States, as well as by some text-writers. By the statutes of this State a distinct offence is made of an affray or agreement to fight; and the effect of the holding is that where such an offence is committed, the indictment must be for an affray, and not for an assault and battery. The civil right of either party to recover of the other for injuries received in an affray is not affected by the statute nor by the decision just referred to. Such seems to have been the view taken by Boynton, J., in the subsequent case of Darling *v.* Williams, 35 Ohio St. 63.

The case of Fitzgerald *v.* Cavin, 110 Mass. 153, is to the effect that consent is no bar to that which occasions bodily harm if the act was intentionally done.

It is upon the same principle of public policy that one, who is the first assailant in a fight, may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defence, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such case, the assaulted party for the assault first committed upon him, and the assailant, for the excess of force used beyond what was necessary for self-defence. Dole *v.* Erskine, 35 N. H. 503, criticising Elliott *v.* Brown, 2 Wend. 499; Cooley on Torts, 165; Darling *v.* Williams, 35 Ohio St. 63; Gizler *v.* Witzel, 82 Ill. 322. And see also Commonwealth *v.* Collberg, *supra.*

It would seem that under the code the right of each combatant to damages might be determined and measured in the same action. Swan's Plead. Prec. 259, n. *a.*

And upon like principle it has been ruled that the doctrine of contributory negligence has no application to

an action to recover damages for an assault and battery. Ruter *v.* Foy, 46 Iowa, 132; Steinmetz *v.* Kelly, 72 Ind. 442; Whitehead *v.* Mathaway, 85 Ind. 85. Negligence of the plaintiff contributing to the injury of which he complains, is taken into consideration only in those cases where the liability of the defendant arises from want of care on his part, occasioning injury to the plaintiff; it does not apply to the commission of an intentional wrong.

A question was made as to the admissibility of the evidence of an agreement to fight, under the issue made by the pleadings, — the answer being a general denial. If the evidence had been competent for any purpose, other than in mitigation of damages, it would have been under the issue as made. It was insisted on in denial of the right of action, and not as an avoidance of it; so that it was not necessary to be pleaded as new matter. If it had been so pleaded, it would have been subject to a demurrer. We think the court erred in its charge to the jury. The injury inflicted, the loss of a finger, was a severe one; it amounted, in fact, to a mayhem. "Where the injury" (a mayhem), says the author of a recent and quite valuable work on criminal procedure, "takes place during a conflict, it is not necessary to a conviction that the accused should have formed the intent before engaging in the conflict. It is sufficient if he does the act voluntarily, unlawfully, and on purpose." Maxwell's Crim. Proc. 260. It was permissible to the defendant to show the agreement to fight in mitigation of damages, but not as a bar to the action.

Judgment affirmed.[1]

[1] Compare Stout *v.* Wren, 1 Hawks, 420 (1821); Shay *v.* Thompson, 59 Wis. 540 (1884); Evans *v.* Waite, 83 Wis. 286 (1892).

See Wam. St. Cas. §§ 17, 58.

JONES v. POWEL.

King's Bench, Mich. 22 Car. II.

[*Reported in* 1 *Mod.* 272.]

Words spoken of an attorney, "Thou canst not read a declaration," *per quod*, etc. — The Court. The words are actionable, though there had been no special damage; for they speak him to be ignorant in his profession, and we shall not intend that he had a distemper in his eyes, etc.

Judgment was given for the plaintiff.[1]

HARRISON v. THORNBOROUGH.

Queen's Bench Hil. 12 Ann.

[*Reported in* 10 *Mod.* 196.]

This was an action for these words: "Harrison got a witness to forswear himself in such a cause; you or he (innuendo, the plaintiff) hired one Bell to forswear himself:" and for these following words, spoken at another time: "Two dyers are gone off (innuendo, become bankrupt), and for aught I know Harrison will be so too within this time twelvemonth:" a verdict for the plaintiff, and joint damages were given.

It was moved in arrest of judgment that the words are not actionable; for though the first branch of the words, if they were alone, are certain enough, yet when he goes on and says, "You, or the plaintiff, hired one Bell to forswear himself," it becomes altogether uncertain to whom the words relate; and to this purpose were cited 1 Roll.'s

[1] Compare Birchley's Case, 4 Co. 16 *a* (Mich. 27 & 28 Eliz.); Dison and Bestney's Case, 13 Co. 71 (Pasch. 8 Jac. I.). See Wam. St. Cas. §§ 42–45, App. I.–III.

Abr. 81, and 1 Cro. 497, where the words were, "one of you three, etc."

Secondly, The declaration does not set forth that what the witness was forsworn in was a material point in the cause.

Thirdly, Supposing the words are actionable, yet if the following words, that were spoken at a different time, are not actionable, then, the damages being joint, the judgment must be arrested.

Fourthly, Those words are not actionable, because the words "gone off" are capable of various constructions, and were therefore to be taken in the most favorable sense. In the case of Chapman *v.* Lampire, 3 Mod. 155, the words were, "He is broken, run away, and will never return again;" and the court were divided.[1]

Fifthly, If the words themselves are not actionable, the innuendo will not help it; for an innuendo is not to set forth new matter, but to refer to something already mentioned in the declaration. In the case of King *v.* Greep, the word "Newnham" (innuendo, "Newnham, in Devonshire"); and in 4 Co. 20 *a*, "burnt my barn" (innuendo, "full of corn"), — the innuendoes were held void, because they set forth new matter.

Sixthly, That the action would not lie, unless Bell had actually forsworn himself; which perhaps the words "got, etc." do not necessarily imply.

The court was of opinion that the plaintiff should have judgment. Precedents in actions for words are not of equal authority as in other actions, because *norma loquendi* is the rule for the interpretation of words; and this rule is different in one age from what it is in another. The words which an hundred years ago did not import a slanderous sense now may; and so *vice versa*. In this kind of action for words which are not of very great antiquity,

[1] The plaintiff's counsel, in answer to the uncertainty of the words, quoted the following authorities: Latch, 219; 2 Keb. 718; Stiles, 142; Cro. Jac. 407; Raym. 217; 1 Lev. 277; 1 Cro. 236; Dyer, 72. — REPORTER.

the courts did at first, as much as they could, discountenance them; and that for a wise reason, because generally brought for contention and vexation; and therefore when the words were capable of two constructions, the court always took them *mitiori sensu*. But latterly these actions have been more discountenanced; for men's tongues growing more virulent, and irreparable damage arising from words, it has been by experience found that unless men can get satisfaction by law, they will be apt to take it themselves. The rule therefore that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them. The words "you or he, etc." do not render the former uncertain; for they relate not to the "getting, etc." but to new matter, viz., who paid the money. Besides, if the words were, "A or D did, etc." either A or D might bring an action; but then there must be an averment that neither of them did it.

It is not necessary to the maintaining of this action, that Bell did forswear himself.

The signification of the words "gone off" are very well known among merchants.

The doctrine laid down concerning innuendoes is undoubtedly true, when understood of matters of fact; but here the innuendoes are not introductory of new matters of fact, but only explanatory of the foregoing words.

Judgment was given for the plaintiff.

ROBERTS AND WIFE *v.* ROBERTS.

Queen's Bench, 1864.

[*Reported in 5 B. & S.* 384.]

THE declaration stated that the plaintiff, Margaret, was a member of a sect of Protestant Dissenters, — to wit, Calvinistic Methodists, — and was a member of a private society

and congregation of that sect held at Denbigh in North Wales, and the sect, and the different societies of it, were subject to certain rules and regulations, and the different members of the sect and the societies were respectively subject to those rules and regulations, and under the control and authority of the several respective societies and of the leaders of the same, with respect to the moral and religious conduct of such members, and with respect to their being respectively allowed and permitted to be and continue to be members of the different societies and congregations of the sect, and by those rules and regulations a member of one society in the sect could not become a member of another society in the sect unless the leaders or elders of the first-mentioned society certified that the said member was morally and otherwise fit to be a member of such sect and of a society of the same; and the defendant, being a member of the sect and of the society to which the plaintiff Margaret then belonged, and well knowing the premises, falsely and maliciously spoke and published of the plaintiff Margaret, and of her as a member of such sect and society, and in the presence of the leaders or elders and other members of the society and congregation which the plaintiffs and the defendant had just before then been attending, the false and scandalous words following in the Welsh language (setting them out), which words, being translated into the English language, have the meaning and effect following, and were so understood by the persons to whom they were so spoken and published; that is to say, "You" (meaning the plaintiff Robert Roberts) have got for a wife" (meaning the plaintiff Margaret) "as great a whore as any in the town of Liverpool. I had connection with her several times, the last time a night or two before she left for Liverpool;" meaning thereby that the plaintiff Margaret had been guilty of such immoral conduct as would prevent her being allowed and permitted to remain, become, or be a member of any society and congregation of the sect aforesaid; and by means of the premises

the plaintiff Margaret was not allowed or permitted to continue or be any longer a member of the society and congregation aforesaid, and was turned out of the same, and the leaders or elders of the society refused to certify that the plaintiff Margaret was morally or otherwise fit to be a member of the sect or of any society or congregation of the same; and the plaintiff Margaret, being desirous of becoming a member of a society and congregation of the sect in Liverpool, was not allowed or permitted or able to become a member of the society in Liverpool, and was prevented from attending religious worship; and by means of the premises the plaintiff Margaret became and was greatly injured in her good name and reputation, and became sick and ill and greatly distressed in body and mind. Averment. That, by means of the premises, the plaintiff Robert Roberts had been put to and incurred great expenses in and about nursing the plaintiff Margaret, and endeavoring to get her cured from her sickness, illness, and distress of mind, and had sustained divers other injuries and damages. And the plaintiffs claimed £500.

Demurrer, and joinder.

McIntyre, for the defendant. The words in the declaration are not actionable without special damage. Allsop and Wife *v.* Allsop, 5 H. & N. 534; Lynch *v.* Knight and Wife, in error, 9 H. L. C. 577. In the written judgment prepared by Lord Campbell, in the latter case,[1] the following passage occurs, p. 593, "I may lament the unsatisfactory state of our law, according to which the imputation by words, however gross, on an occasion, however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special damage to her; but I am here only to declare the law."

And no special damage is alleged sufficient to render the words actionable by reason of such damage. The allegation

[1] Lord Campbell died before judgment was given in that case, but the written judgment was read by Lord Brougham. — REPORTER.

that the plaintiff Margaret was injured in her good name and reputation, and became sick and ill and distressed in body and mind, is not sufficient. Allsop and Wife *v.* Allsop, 5 H. & N. 534. [*Crompton Hutton, contra.* That is admitted.] The remaining head of special damage, that she was not allowed to continue a member of the society and congregation of Calvinistic Methodists, and was prevented from attending religious worship, is not temporal or pecuniary damage. The first part amounts to no more than that she was excluded from associating with particular persons; it is not alleged that she was a teacher in the society and congregation, or that she derived any special advantage from being a member of it. As to the other part, the elders could not prevent her from attending the chapel. In Bateman and Wife *v.* Lyall and Wife, 7 C. B. N. S. 638, there was an allegation of loss of customers by the husband in his business in consequence of the words spoken of his wife by the female defendant.

Crompton Hutton, contra. Sufficient special damage to the wife is shown, for which the husband may maintain this action. If the special damage must be pecuniary, an action for slander of a wife never could be maintained, as the damage would be to the husband, not to the wife. An action will lie for words spoken by which a woman has lost her marriage. Davis *v.* Gardiner, 4 Co. 16 *b.* [BLACKBURN, J. Marriage has always been considered a valuable consideration.] In Lynch *v.* Knight and Wife, 9 H. L. C. 577, the special damage relied upon was not the natural and probable consequence of the words spoken; but it was the opinion of Lord Campbell, at p. 589, that loss of *consortium*, or conjugal society, would give a cause of action to a wife as well as to a husband. [BLACKBURN, J. Lord Cranworth, p. 595, was strongly inclined to agree in that, though Lord Wensleydale was of a different opinion. CROMPTON, J. The loss of *consortium* of the wife has always been considered a temporal damage in an action by the husband for criminal conversation.] In the present case there is a loss

of something more than *consortium vicinorum;* the wife was a member of a religious society and congregation, and as such entitled to a seat in the chapel belonging to that society and congregation; but in consequence of the words spoken by the defendant she was turned out of it. [*McIntyre.* It is not alleged that she was entitled to a seat in the chapel without payment. BLACKBURN, J. Unless she has been deprived of something of pecuniary value, it is difficult to distinguish the present case from that of slander of a chaste unmarried woman.] The court will not extend that doctrine. Value is attached to social advantages and position, of which the court will take notice: the wife had a status as member of the society and congregation, which she has lost. [COCKBURN, C. J. She had no other benefit from it except attending a congregational place of worship; and she may get that benefit whether she attends as a member of the society or not.] A right to a seat in a church or chapel is an advantage of which the law will take notice. The reason why the loss of *consortium vicinorum* is not sufficient special damage is that the most capricious motives may deprive a person of it. [He referred to Com. Dig. Action upon the Case for Defamation (D. 30).]

McIntyre was not called upon to reply.

COCKBURN, C. J. No cause of action is shown on this declaration, as it does not allege special damage sufficient to make the words spoken of the female plaintiff actionable. It is admitted that the loss of *consortium vicinorum* is not sufficient; and I am of opinion that the loss by the female plaintiff of membership of this society and congregation, which appears to have been constituted for religious or spiritual purposes, amounts at most to no more than the loss of the merely nominal distinction of being able to call herself a member of it. It does not appear that any real or material advantages attach to membership; such as loss of a seat in the chapel, or of the opportunity of attending divine worship there. If by reason of the words

spoken, the female plaintiff had been excluded from the meetings for religious worship, or from anything substantial which by right attached to membership of the society, I should be disposed to hold that it was sufficient special damage. I think that to prevent a woman whose character for chastity is assailed from bringing an action for the purpose of vindicating it is cruel; but, as the law at present stands, such an action is not maintainable unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. That is not shown in this declaration, and therefore I reluctantly hold that the demurrer is good. If upon further inquiry anything can be found amounting to such special damage as the law requires, the plaintiffs may have leave to amend their declaration.

CROMPTON, J. On the last observation made by the Lord Chief Justice, I wish to remark that the amendment should be immediate, so that the cause may be tried at the coming assizes.

I agree that the present case falls within the rule that the loss of *consortium vicinorum* is not sufficient special damage. Here is no loss of a temporal nature; or, if there be any, it is merely nominal. Though I wish the law were different in the case of words affecting the chastity of a woman, yet the line must be drawn somewhere between words which are and words which are not actionable; and if we held that the action for slander could be supported by the allegation that the plaintiff had suffered some nominal special damage, we must apply that doctrine to all kinds of less disparaging words, and should thereby encourage actions which ought not to be brought, as for saying that a person did some disreputable act, though not essentially criminal. My only doubt is, whether the being prevented from attending religious worship is sufficient special damage; but if it was conducted in a chapel, the female plaintiff could not be prevented from attending and occupying a seat there, especially if she paid for her seat. We do not however

know how that is: it is not even stated that this society had a chapel. The special damage alleged is of a nominal nature, and therefore our judgment must be for the defendant.

BLACKBURN, J. The law upon the subject of disparaging words spoken of other persons is not in a satisfactory state. For words written an action is maintainable, though possibly not more than one farthing damages could be obtained, whereas for words spoken imputing unchastity to a woman no action can be maintained unless special damage is shown; for which purpose there must be material injury to the interests of the person slandered. What is here alleged is no more than loss of the *consortium vicinorum*.

Judgment for the defendant.

LEWIS SUNDERLIN ET AL., Respondents, *v.* HENRY BRADSTREET ET AL., Appellants.

Court of Appeals of New York, 1871.

[*Reported in* 46 *N. Y.* 188.]

APPEAL from judgment of the late General Term of the seventh judicial district, entered upon order denying motion for new trial, and directing judgment on verdict in favor of plaintiffs.

The plaintiffs were merchants, doing business in the city of Rochester. The defendants were the proprietors of a mercantile agency. They published a semi-annual volume, containing the names of persons and firms doing business in various parts of the United States and Canadas, and information in reference to their financial credit. They also published what they called a weekly sheet of corrections, which was sent to their subscribers in the city of New York by private messenger, and in the country by

mail. About ten thousand copies of their semi-annual volume, and between three and four thousand copies of their weekly sheet are so distributed.

In this weekly sheet, under the date of January 31st, 1868, they published that the plaintiffs had failed. This was confessedly false. The plaintiffs called upon the defendants, for the names of the parties furnishing the information, which they refused to give, but published the next week a retraction of the report complained of.

The jury found a verdict for plaintiff for $400. Case and exceptions ordered to be heard at first instance at General Term.

Delavan F. Clark, for appellants. That if the communication was privileged, the action is not maintainable without proof of express malice. Harris *v.* Thompson, 24 Eng. L. & E. 370; Fowles *v.* Bowen, 30 N. Y. 20. The communication was privileged. *Cur.*, per Campbell, 2 Ch. L., in Harrison *v.* Bush, 5 Ell. & Bl. Q. B. 348; Van Wyck *v.* Aspinwall, 17 N. Y. 193; Selden, J., in Lewis & Herrick *v.* Chapman, 16 id. 369; Parke, B., in Toogood *v.* Spyring, 1 Cromp. Mees. & Rosc. 193; Goldstein *v.* Foss, 2 Car. & P. 252; s. c. 6 B. & C. 154; Gettings *v.* Foss, 3 Car. & P. 160; Fleming *v.* Newton, 1 H. L. C. 379; Fowles *v.* Bowen, 30 N. Y. 20; note to Wyatt *v.* Gore, Holt's N. P. 299; Townsend on Slander and Libel, § 239; Billings *v.* Russell & Waters, Boston Law Reporter, vol. 8, N. S. 669; Ormsby *v.* Douglass, 37 N. Y. 477, overruled, Taylor *v.* Church, 8 id. 452. A person, believing himself possessed of knowledge, which, if true, does or may affect the rights and interests of another, may communicate it to that other. Townsend on Libel and Slander, § 241; 2 Greenl. Ev. § 421. Liberty of publication is permitted to the extent of the exigencies of society and business. Parsons *v.* Surgey, 4 Foster & Fin. 248, and note; Toogood *v.* Spyring, 1 Cromp. M. & Rosc. 181; Taylor *v.* Hawkins, 16 Adol. & Ellis, N. S. Q. B. R. 308; Lawless *v.* Anglo-Egyptian Cotton and Oil Co., Law Rep. 4 Q. B. 262;

Fleming *v.* Newton, 1 House Lords Cas. 379; Gassett *v.* Gilbert, 6 Gray, 94.

W. F. Cogswell, for respondents. The communication was not privileged. Taylor *v.* Church, 8 N. Y. 452.

ALLEN, J. The only question presented by the appeal has respect to the character and occasion of the publication of the alleged libel, and is, whether the circumstances and occasion of the publication were such as to absolve the defendants from liability, in the absence of proof of express malice; that is, whether it is within the protection of privileged communications.

We might properly decide this question upon the authority of Taylor *v.* Church, 4 Seld. 452, in which this precise question was determined by a unanimous court, seven judges taking part in the decision, the other judge refraining from expressing an opinion, for the reason that he was not present at the argument.

The point was made upon the trial of the action, and presented by counsel upon the appeal in this court, and was material to be decided for the guidance of the court below, upon a re-trial which this court ordered, inasmuch as, if the publication was privileged, it would probably be fatal to the plaintiff's cause of action; and the court, by a deliberate and formal resolve, adjudged that the alleged libel was not a privileged communication. The circumstances under which this judgment was given, as well as the method adopted by the judges in determining this precise question by a formal declaration, entitle the decision to peculiar weight as an authority. That case cannot be distinguished from this in any circumstance favorable to the defendant.

The decision, as abstracted by the reporter, was that "one who undertakes, for an association of merchants in New York, to ascertain the pecuniary standing of merchants and traders residing in other places, who are customers of some of the members of the association, and who

furnishes reports to all the members of the association, irrespective of the question whether they have an interest in the question of the standing of such merchants and traders, is liable for any false report made by him prejudicial to the credit of the subject of it, although made honestly, and from information upon which he relied."

In the case before us, the defendants were in no sense the agents of an association of merchants, or of their patrons. Of their own volition, and for their own profit, they established a bureau for collecting and disseminating information as to the character, credit, and pecuniary responsibility of merchants and traders throughout the United States. The business is in the nature of an intelligence office; and it is not intended by this to intimate that it is not an entirely lawful and reputable business; or that it is not of general utility, or perhaps a necessity to the commerce and business of the country. All may be conceded that is claimed for it by its friends; but in its conduct and management it must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to like acts by others. The information acquired by them was their own, and was communicated to others, or made public in such form and upon such terms as the defendants dictated.

In the established course of their business, they communicated with their patrons by means of semi-annual publications, with weekly corrections printed and furnished to each, the number of copies of each publication being about 10,000, distributed to every part of the country among merchants, bankers, and traders.

The alleged libel was published in one of the weekly corrections of the regular semi-annual publications, and was thus extensively circulated. Its distribution was general among all the subscribers to the defendants' publication, irrespective of their interest in the question of the plaintiffs' credit and standing.

Whether a libel or slander is within the protection

accorded to privileged communications, depends upon the occasion of the publication or utterance, as well as the character of the communication. The party must have a just occasion for speaking or publishing the defamatory matter. A communication is privileged within the rule when made in good faith, in answer to one having an interest in the information sought; and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper that he should give the information. Todd *v.* Hawkins, 8 C. & P. 88; Cockayne *v.* Hodgkisson, 5 C. & P. 543; Washburn *v.* Cook, 3 Den. 110, per Selden, J.; Lewis *v.* Chapman, 16 N. Y. 369. It is not necessary to go farther in this case; and it may be assumed that if any one having an interest in knowing the credit and standing of the plaintiffs, or whom the defendants supposed and believed had such interest, had made the inquiry of the defendants, and the statement in the alleged libel had been made in answer to the inquiry in good faith; and upon information upon which the defendants relied, — it would have been privileged. This was the case of Ormsby *v.* Douglass, 37 N. Y. 477. The business of the defendant in that action was of a similar character to that of the present defendants; and the statement complained of was made orally, to one interested in the information, upon personal application at the office of the defendant, who refused to make a written statement.

There was no other publication, and it was held that the occasion justified the defendant in giving such information as he possessed to the applicant. Taylor *v.* Church was referred to as authority for the rule, and so far from being overruled or questioned, was affirmed. The decision in Taylor *v.* Church was placed upon the ground that the alleged libel was printed by the procurement of the defendant, and distributed by him to persons having no special interest in being informed of the condition of the plaintiffs' firm.

In the case at bar, it is not pretended that but few, if any, of the persons to whom the 10,000 copies of the libellous publication were transmitted, had any interest in the character or pecuniary responsibility of the plaintiffs; and to those who had no such interest, there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed the legal responsibility which rests upon all who, without cause, publish defamatory matter of others; that is, of proving the truth of the publication, or responding in damages to the injured party.

The communication of the libel to those not interested in the information was officious and unauthorized, and therefore, not protected, although made in the belief of its truth, if it were, in point of fact, false. When a communication is made in the discharge of some public or private duty, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending on the absence of malice. Toogood *v.* Spyring, 1 C. M. & R. 181; Fowles *v.* Bowen, 30 N. Y. 20. There has been no diversity in the utterances of judges and courts upon the subject, but all have spoken one language. See 5 Blatch. C. C. 498.

In those cases in which the publication has been held privileged, the courts have held that there was a reasonable occasion or exigency, which, for the common convenience and welfare of society, fairly warranted the communication as made. But neither the welfare nor convenience of society will be promoted by bringing a publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast through the land, within the protection of privileged communications. The principle of Taylor *v.* Church is recognized in all the cases. Harris *v.* Thompson, 13 C. B. 333; Van Wyck *v.* Aspinwall, 17 N. Y. 190; Harrison *v.* Bush, 5 E. & B. 344; Goldstein *v.* Foss, 6 B. & C. 128;

Getting *v.* Foss, 3 C. & P. 160. The fact that the libellous statement was in cipher is not material. It was in language understood by the numerous patrons of the defendants and all the subscribers to the publications. They had the key to the cipher, and the publication was equally significant and injurious as if made in the distinct terms, in the very words indicated by the numeral figures used.

The judgment should be affirmed.

All concur.

Judgment affirmed.[1]

CASTLE *v.* HOUSTON.

Supreme Court of Kansas, 1877.

[*Reported in* 19 *Kan.* 417.]

Error from Leavenworth District Court.

CIVIL ACTION, brought by Castle, to recover damages sustained by him by reason of a certain alleged libel published by Houston. The defendant, Houston, was the editor and publisher of the "Daily Commercial," a newspaper printed at Leavenworth, where Castle resided. In the winter of 1875, while the State legislature was in session at Topeka, Houston had a correspondent at Topeka, who wrote regularly for the "Commercial" in regard to proceedings and matters pending in the legislature. Previous to the meeting of the legislature certain adverse criticisms had been made in several quarters, notably in the annual report of the Auditor of State, regarding the insurance department and its management; and the plaintiff, Castle, was generally credited with inciting and provoking such criticisms. The "Commercial's" correspondent was A. J. Downing, and he wrote over the signature, "JACK." The alleged libel ap-

[1] Compare King *v* Patterson, 49 N. J. L. 417, 419, 433 (1887); Williams *v.* Smith, 22 Q. B. D. 134 (1888); Bradstreet Co. *v.* Gill, 72 Tex. 115 (1888); Woodruff *v.* Bradstreet Co., 116 N. Y. 217 (1889).

peared in one of "JACK'S" letters, and is set out in the opinion, *infra*. The pleadings and proceedings in the district court are sufficiently stated in the opinion. The district court, at the May Term, 1875, after verdict in favor of the plaintiff, on motion set aside such verdict, and granted a new trial; and from such order and proceeding, Castle appeals, and brings the case here on error.

Byron Sherry, and *Scott Ashton*, for plaintiff.

T. A. Hurd, for defendant.

The opinion of the court was delivered by

HORTON, C. J. This was an action commenced in the district court of Leavenworth County, to recover damages for libel. The petition alleges in substance, that the defendant was editor, proprietor, and publisher of the Leavenworth "Daily Commercial," a newspaper printed in the city of Leavenworth, and that on the 20th of January, 1875, there was published in the said paper, of and concerning the plaintiff, a certain false and malicious libel, in words as follows, to wit: —

"The insurance department of our State will in all probability be subject to a thorough investigation, as a bill has already been introduced into the Senate to investigate. This is right. Every insurance company in the State is willing an investigation be had. Mr. Russell, ex-superintendent, invites it, and the present superintendent is anxious for the same.

"There is a cadaverous-looking individual of Leavenworth loafing around here who seems exceedingly anxious for an investigation, in hopes that the superintendent will be done away with and the department presided over by the auditor. A clerkship in the dim distance makes him enthuse. I cannot blame Castle much, knowing that board and other bills too numerous to mention have been pressing him for some time, and then doubtless the Northwestern Life would be glad to hear from him, as he was published

as a defaulter to that company. He is one of the most promising individuals (to his landlords) I know of, and the cry of fraud from such a completely played-out insurance agent has but little bearing with an intelligent body of legislators. If his caliber was as large as his bore, he would be a success. JACK."

In answer to the petition, defendant set up three defences: first, an admission that the article complained of was published in defendant's paper, of and concerning the plaintiff, but denied that the same was published with malice; second, that defendant had no personal knowledge of the publication of the article at the time of its publication, with the further allegation that the several matters and things in the article, complained of as defamatory, were true, and published for justifiable ends and purposes; and third, a general denial. To the answer plaintiff filed a reply, denying generally, save and except what was admitted, all the allegations in the answer. When the case came on for trial, it was submitted to a jury, and plaintiff obtained a verdict for $1,250, whereupon defendant gave notice of motion for a new trial, which was filed, and after being argued was by the court sustained, upon the ground that the court had erred in its instructions to the jury. The plaintiff excepted, and has brought the case here for review.

It appears from the record that the court below granted the motion for a new trial on the ground that the jury was misdirected by the following instructions, viz.: —

"The fact of the language being true is not alone an answer to the charge, but can only be shown in mitigation of damages.

"It is not a defence simply to show the truth of the matter published, but the party must go further, and show that it was not only true, but that he acted with good motives and for a justifiable end, and that he had some purpose in view that was justifiable. If that be the case, if he acts honestly for good purposes and for justifiable ends,

and what he says is true, then he is to be excused or acquitted."

In this condition of the case, we must first inquire whether the instructions above set forth were improperly given on the trial. If erroneous as a statement of the law controlling the case, they certainly may have misled the jury. If correct in principle, and applicable under the issues presented, the court erred in granting a new trial for the reason given. An examination of this question will lead to a brief review of the law of libel in both criminal and civil prosecutions, so far as to consider and determine when a defendant may be permitted to give the truth in evidence as a full justification of alleged libellous matter.

It was at one time the rule of the common law that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth, the greater the libel." This doctrine was based upon the theory that where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party grieved ought to complain for an injury to the settled course of law; and to neglect this duty, and publish the offence to the world, thereby bringing the party published into disgrace or ridicule, without an opportunity to show by the judgment of a court that he was innocent, was libellous; and if the matter charged was in fact true (thereby insuring social ostracism), the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein, the greater the liability of hostile meetings therefrom.

That this was the true rule of the common law has been denied by many of the ablest jurists in both England and America, who maintained that the liberty of the press consisted in the right to publish, with impunity, truth, with good motives and for justifiable ends, whether it respected government, magistracy, or individuals. It certainly was derived from the polluted source of the Star Chamber, and was considered at the time an innovation, but like some other precedents, although arbitrarily and unjustly established, it came to be followed generally by the courts, and sustained as the law of the land. In 1804, in the State of New York, this principle of law was recognized and asserted in the case of The People *v.* Croswell. In that case the defendant was prosecuted for libel for having published in his newspaper, at Hudson, in that State, called the "Wasp," the charge against Thomas Jefferson, then president, that he (Jefferson) paid Callender for calling Washington a traitor, a robber, and a perjurer. The defendant, through his counsel, Alexander Hamilton, applied to the judge at the circuit to put off the trial to obtain the testimony of Callender to prove the publication true. Lewis, C. J., presiding, denied the motion, because the testimony was inadmissible, as the truth of the facts charged as libellous did not amount to a complete justification. 3 Johns. (N. Y.) Cases, 336. This case attracted so much attention that, after a verdict of guilty had been rendered, and while the case was pending in the courts of New York on a motion for a new trial, the legislature of that State passed a law providing that in every prosecution for writing or publishing any libel, it should be lawful for the defendant, upon the trial, to give in evidence, in his defence, the truth of the matter contained in the publication charged as libellous, and that such evidence should not be a justification, unless it should be further made satisfactorily to appear that the matter charged as libellous was published with good motives and for justifiable ends. Since the adoption of the New York statute declaratory of the law of libel in crim-

inal actions, nearly every State in the Union has made the subject a matter of constitutional or statutory provision. The wise framers of our own Constitution, peculiarly acquainted with the beneficial influences of free discussion and a free press, as participants in the historical incidents and conflicts surrounding the settlement of the Territory of Kansas, modified the tyrannical and harsh rule of the common law as stated in the Star Chamber of England, and thereafter generally understood and interpreted, by providing in section 11 of our Bill of Rights, that —

"The liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libellous matter was published for justifiable ends, the accused party shall be acquitted."

Nevertheless, these framers, in a spirit of wisdom, and to preserve order, were careful not to give, as against the interests of the public, complete license even to the truth when published for the gratification of the worst of passions, or to affect the peace and happiness of society. They prescribe that the accused should be acquitted, not on proof of the truth of the charge alone, but it should further appear the publication was made for justifiable ends. Following the intendment of the Constitution, the legislature afterward provided in the act relating to crimes and punishments that —

"In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appears to them that the matter as charged as libellous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted." Sec. 272, Gen. Stat. 376.

But the law-makers, jealous of the liberty of the press, and fearing the construction of the law by the courts in such prosecution, further provided, in a succeeding section of the same act, that —

"In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact." Sec. 275, Gen. Stat. 377.

While the rule of the common law, as generally applied, was so exacting and rigorous to the defence of justification in criminal prosecutions for libel, a different doctrine was applicable in civil cases. In the case of King *v.* Root, 4 Wend. 114, 139, Chancellor Walworth clearly states this difference as follows: "The difficulty which existed in England, previous to Mr. Fox's libel act, was, that in criminal prosecutions the defendant was not permitted to give the truth in evidence; and yet the jury were required to imply malice. But in civil cases the defendant was permitted to give the truth in evidence as a full justification. Such was declared to be the law by the judges at the time that bill was under discussion in Parliament, and there never has been any alteration of the law in England on this subject in civil suits." The case of King *v.* Root, *supra*, was originally tried at one of the circuits in New York before Hon. Samuel R. Betts. The defendants, King and Verplanck, were editors of the New York "American," printed in the city of New York in 1824. These editors published concerning one Root, lieutenant-governor of that State, among other things, that in August of that year he addressed the State Senate, then in session, "while blind with passion and rum, when he was unwashed, unshaven, haggard, with tobacco-juice trickling from the corners of his mouth, and in a condition outraging all order, decency, and forbearance." Root brought a civil action to recover damages for the alleged libel, and the defendants admitted the publication and pleaded the truth as justification. The trial judge instructed the jury, "if the defendants had only published the truth, they had an unquestionable right to do that, and they must be acquitted."

Blackstone, in his Commentaries, asserts that the truth could always be given in civil cases in justification of libel,

and seems to consider the defendant's exemption in such instances as extended to him in consideration of his merit in having warned the public against the evil practices of a delinquent. He says that it is *damnum absque injuria*, intimating that the act of the defendant, who justifies a libellous publication, does not constitute a wrong in its legal sense, and then proceeds to observe that this is agreeable to the reasoning of the civil law. 3 Bl. Com. 125. This is illogical; and Starkie bases this exemption on the better reason, that in such instances the plaintiff has excluded himself from his right of action at law by his own misconduct, and not to any merit appertaining to the defendant. When a plaintiff is really guilty of the offence imputed, he does not offer himself to the court as a blameless party, seeking a remedy for a malicious mischief; his original misbehavior taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled. Folkard's Starkie on Slander and Libel, Am. ed. § 692.

There are many good and sufficient reasons why a publisher of a statement, true in fact, yet given to the public with a malicious design to create mischief, should be amenable to the criminal laws, and yet not be liable in a civil action. On general principles, no right to damages can be founded on a publication of the truth, from the consideration that the reason for awarding damages in every such case fails. The right to compensation in point of natural justice is founded on deception and fraud which have been practised by the defendant to the detriment of the plaintiff. If the imputation is true, there is no deception or fraud, and no right to compensation. The criminal action in libel is supported to prevent and restrain the commission of mischief and inconvenience to society. Take the case of two men who agree to engage together in fisticuffs; the law for the protection of the peace of society, and to prevent greater collisions, may arrest and punish both combatants, and yet neither may be able to recover from the

other personal damages. Where a person makes the publication solely to disturb the harmony and happiness of society, or to maliciously annoy and injure the feelings of others, or to create misery by exposing the latent and personal defects of associates or acquaintances, the interests of the public require some preventive, notwithstanding the truth of the publication. This is furnished by the criminal law. But mere injury to the imagination or feeling, however malicious it may be in its origin, or painful in its consequences, is not properly the subject of remedy by an action for damages. Such offences, being unconnected with any substantive right, are incapable of pecuniary admeasurement and redress. They admit of no exact definition; and, therefore, to extend a remedy to such injuries generally, would be productive of great uncertainty and inconvenience, and open far too wide a field of litigation. Again, it seems to be clear that a party who acquires an advantage by concealing the truth, which he could not have attained to had he divulged it, so far is guilty of fraud in the concealment that he cannot upon any principle claim a right to acquire that benefit, and therefore cannot complain that he is injured by the publication of the truth. Starkie, id. 35. In this view the truth hurts no one.

In accordance with the doctrine that the defendant is justified in law, and exempt from all civil responsibility, if that which he publishes be true, it is provided in the civil code, section 126, that —

"In all actions mentioned in the last section (libel and slander), the defendant may allege the truth of the matter charged as defamatory, and may prove the same and any mitigating circumstances, to reduce the amount of damages, or he may prove either."

This section of the code may be construed to mean, "in actions for libel or slander, the defendant may allege the truth of the matter charged as defamatory, and may prove the same (as a defence or full justification), and (he may also allege) any mitigating circumstances (in the same

answer) to reduce the amount of damages, or he may prove either (the truth as a defence, or mitigating circumstances to reduce the damages)." In other words, under the code, the truth is a full justification in a civil action; and in the absence of justification, mitigating circumstances may be proved to reduce the damages; and justification and mitigation may be set forth in the same answer, and the defendant may prove either, or both. Gen. Stat. 653.

If it be contended that within the provision of the Constitution, the proof of the truth as a defence in a civil action is no justification, except it be also made to appear that the publication was had for justifiable ends, we answer, that in view of the rule of law applicable in such cases at the time of the adoption of the State Constitution, we do not think such a construction proper. It is not in accordance with the spirit or the letter of that instrument. It provides that in civil and criminal actions the truth may be given in evidence to the jury, and where an accused is on trial, — that is, where a person charged with a crime for the publication of alleged libellous matter is being tried, — he is not to be acquitted except the publication is true and the same was published for justifiable ends. In that event only is the accused party entitled to an acquittal. The word "accused" is used in the Constitution; and an "accused" being one who is charged with a crime or misdemeanor, it cannot well be said to apply to a defendant in a civil action. If the motive of the party publishing the truth is to be considered in civil suits, under the Constitution, then this section quoted, instead of operating to the protection of individuals charged in personal actions for damages for the publication of alleged libellous matter, as was doubtless intended by the framers of the Constitution, would have the effect to hold parties responsible in cases where at the common law they would be entitled to a verdict. The Constitution contains no grant of powers to the legislature. It is only a limitation on the exercise of its authority; and the legislature, in its discretion, has the

right to pass any act not violative of the State or Federal constitutions. The object of section 11 of the Bill of Rights was to prevent the passage of any law in Kansas restraining or abridging the liberty of speech and of the press. By it, the harsh rule of the common law, as generally recognized in libel prosecutions, was greatly modified; but we cannot seriously think that it was intended thereby to abrogate that principle of the common law — sustained and upheld under the exacting and arbitrary construction of libels in England — that proof of the truth is a complete justification in all civil actions. Nor can we believe that thereby it was intended that the legislative power of the State was forever deprived of conferring the right upon a defendant in a civil action of libel to plead the truth of the words charged as a full and complete defence. To assert otherwise would be to assert that the Constitution abridged and curtailed the liberty of the press in civil actions more than the common law — more than the provisions of the constitutions of other States. The modification of the common law by the Constitution we construe in favor of the liberty of the press, not against it. To conclude otherwise would be to ignore the popular sentiment in Kansas at the adoption of the Constitution, and assume that the successful contestants in behalf of a free press were forgetful in their victories of its powerful influences in their behalf, or had unwittingly deprived themselves of rights allowed in England under the sway of despotic monarchs and the rule of arbitrary judges. The Constitution of Rhode Island provides, "in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defence to the person charged." And it was held in that State that the truth of the charge is a good defence in a civil action for libel. Perry *v.* Mann, 1 R. I. 263. From our review of the authorities, the provision of our Constitution, the civil and criminal codes, we deduce these important principles: —

First, In all criminal prosecutions, the truth of the libel

is no defence unless it was for public benefit that the matters charged should be published; or in other words, that the alleged libellous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine at their discretion the law and the fact.

Second, In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions the jury must receive and accept the direction of the court as to the law.

Under this view, the court below misdirected the jury in a very material point, and properly, on attention being again called to the matter by a motion for a new trial, granted such motion, and set the case again for hearing. The instructions given might have been applicable in a criminal proceeding, where the motive of the publication is important, and where the jury have the right to determine the law as well as the fact; but were erroneous in a civil action, where the facts charged were proven in justification. The instructions assumed that the truth is not a full and complete defence unless it was shown to have been published for good purposes and justifiable ends. This is not correct. If the charges made by the defendant are true, however malicious, no action lies. Root *v.* King, 7 Cow. 613, 632; Townsend on Slander and Libel, § 211; Foss *v.* Hildreth, 10 Allen, 76; Baum *v.* Clause, 5 Hill, 196; 1 Stark. on Sland. 229; Rayne *v.* Taylor, 14 La. An. 406.

The plaintiff in error contends that the instructions could not have been prejudicial to the defendant in error, as the plea of justification was insufficient in form, and therefore the district court erred in granting a new trial. The answer among other things alleged "that the matters charged as defamatory were true." No motion was filed in the case to make the answer more definite or certain; no demurrer was presented; no objection taken to the evidence of the truth

of the charge, as we can ascertain; and from the record we must assume that the case was tried on the theory that the defendant was attempting to show as justification the truth of the publication, and we may assume that the evidence tended to prove the truth of the publication. Under these circumstances the point now made by counsel of the plaintiff as to the immateriality of the instructions is not well taken. The case was heard by the district court on the supposition that the plea of justification was sufficiently formal — the instructions of the court discuss what is necessary to be shown to make the truth a full justification, and the jury having been misdirected in the hurry of the trial, no error was committed in setting aside the verdict. Had the action of the court been otherwise, on proper application, we would have reversed the judgment. If any delay has resulted to the plaintiff in error in obtaining a speedy trial, it has been caused by the pendency of this proceeding in error in this court, where it was brought by the plaintiff. For this action the defendant in error was not responsible.

The order of the district court setting aside the verdict of the jury in the case and granting a new trial is affirmed.

All the justices concurring.[1]

AMASA R. MOORE, Appellant, *v.* THE MANUFACTURERS' NATIONAL BANK OF TROY ET AL., Respondents.

Court of Appeals of New York, 1890.

[*Reported in* 123 *N. Y.* 420.]

ANDREWS, J.[2] This is an action for libel. On the trial the plaintiff recovered a small verdict. He appealed to the General Term from the judgment in his own favor, on the

[1] At the end of the original report is a note by the reporter.

[2] The arguments of counsel are omitted.

ground that the trial judge admitted improper evidence offered by the defendant, and also that he erroneously submitted to the jury the question whether certain facts alleged in the answer of the defendant, in mitigation of damages, existed, although there was an absence of any proof to sustain such allegations. It is claimed that, by reason of these errors, the plaintiff was prejudiced in respect of the award of damages.

There is, we think, no doubt that errors were committed by the trial judge in the respects mentioned. The plaintiff is, therefore, entitled to a new trial, unless the defendant is right in his contention that the alleged libel was a privileged publication, and, therefore, no recovery whatever was justified.

It will be sufficient to state very briefly the facts upon which the action is based, in order to present the question to be determined. In 1883, the Manufacturers' National Bank of Troy, claiming that its cashier had misappropriated and embezzled the property and funds of the institution, brought an action on the cashier's bond against the surviving surety and the representatives of a deceased surety to recover the amount of the alleged defalcation. The agent of some of the defendants in the action thereupon applied in writing to the attorneys of the bank for a statement of the claim. This was furnished, but not in detail, and the agent of the sureties, desiring fuller information, called at the banking-house of the bank, and there had an interview with the cashier and requested him to furnish as particular and complete an account as he could, "so that we could see how we stood." In compliance with the request, the bank by its cashier prepared and delivered to the agent of the sureties a paper indorsed "A partial statement in detail of the defalcations of A. B., late cashier of the Manufacturers' National Bank of Troy," which contained an itemized account, with dates and amounts constituting the claim. The account comprised a statement of alleged false charges made by the cashier in the accounts of depositors, items for drafts and securities of the bank abstracted, and, in addition, items

amounting in the aggregate to $16,621.95, entered in the account as "cash items drawn from the bank *by collusion with the teller*, without the knowledge or authority of the officers of the bank." The alleged libel for which this action is brought is founded on the words "by collusion with the teller," contained in this statement, and also on a repetition of the same words in a similar account subsequently furnished as a bill of particulars in the action, on the demand of the attorneys for the sureties. The plaintiff in the present action was the teller of the bank during the period of the alleged defalcations by the cashier, and no question is made but that the words "by collusion with the teller," contained in the statement delivered to the agent of the sureties and in the bill of particulars referred to him.

It cannot admit of question that the publication was libellous and sustained the action, unless the publication was, as claimed, privileged. It charged the plaintiff with complicity in the crime of embezzlement committed by the cashier. The words are susceptible of no other interpretation. The general doctrine of privilege, as applied to actions for libel and slander, is founded upon the reasonable view that in the intercourse between members of society, and in proceedings in legislative bodies and in courts of justice, occasions arise when it becomes necessary or proper that the character and acts of individuals should be considered and made the subject of statement or comment, and that, in the interests of society, a party making disparaging statements in respect to another on such a lawful occasion, should not be subjected to civil responsibility in an action of this character, although such statements were untrue. The law of privilege has been stated by judges in different forms of words, but the comprehensive definition of Blackburn, J., in Davis *v.* Sneed (L. R. [5 Q. B.] 611), as applied to communications between individuals, is especially worthy of notice. "Where," says that learned judge, "a person is so situated that it becomes right in the interests of society that he should tell a third person certain facts, then if he,

bona fide and without malice, does tell them, it is a privileged communication." There are many examples in the books of communications held to be privileged, where the same words, if used other than on a lawful occasion, would be libellous, but which, by reason of the occasion when they were published or spoken, will not sustain an action, although proved to be untrue, unless proved to have been spoken maliciously. The cases of charges made in giving the character of a servant, or in answering an authorized inquiry concerning the solvency of a tradesman, or where the communication was confidential between parties having a common interest in the subject to which it relates, are illustrations. (Bronson, J., Washburn *v.* Cooke, 3 Den. 112.) In these and like cases the privilege is not absolute, but conditional; that is to say, the occasion being lawful, the communication is *prima facie* privileged and rebuts the inference of malice which would otherwise arise, and imposes on the plaintiff, who prosecutes an action of slander or libel, the burden of proving that the defendant was moved by actual malicious intent in making the communication, and, failing in that, he fails in the action. But, as has been said, if the occasion is not a privileged one, the same words may give a right of action, as where an employer, being under no duty, legal, moral, or social, to give information, makes defamatory statements affecting the servant's character, or where a person, under like circumstances, imputes insolvency to a trader. In such cases the law presumes both malice and the falsity of the words, and the defendant is liable for damages unless he can prove that the words were true.

There is another class of privileged communications where the privilege is absolute. They are defined in Hastings *v.* Lusk, 22 Wend. 410. In this class are included slanderous statements made by parties, counsel or witnesses in the course of judicial proceedings, and also libellous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defence of an action. In questions falling within the absolute privilege the question of malice has

no place. However malicious the intent, or however false the charge may have been, the law, from considerations of public policy and to secure the unembarrassed and efficient administration of justice, denies to the defamed party any remedy through an action for libel or slander. This privilege, however, is not a license which protects every slanderous publication or statement made in the course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation, or at least it does not protect slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant. Ring *v.* Wheeler, 7 Cow. 725; Hastings *v.* Lusk, 22 Wend. 410; Gilbert *v.* People, 1 Den. 41; Grover, J., Marsh *v.* Ellsworth, 50 N. Y. 309; Rice *v.* Coolidge, 121 Mass. 393; McLaughlin *v.* Cowley, 127 id. 316.

Where the claim of privilege is interposed as a defence to an action for libel or slander, it is not the test of privilege that the words were uttered or published on a privileged occasion. Where there are several distinct charges, some privileged and some not privileged, those not privileged are not justified by the charges that are privileged. Clark *v.* Roe, 4 Ir. C. L. 1; Tuson *v.* Evans, 12 Ad. & El. 733; Warren *v.* Warren, 1 C. M. & R. 250. The policy upon which the doctrine of privilege rests does not call for an extension of the privilege to such cases. The public interests are sufficiently protected when the privilege is limited to communications which fairly ought to have been made, or in case of judicial proceedings to matters not wholly outside of the cause. But no strained or close construction will be indulged in to exempt a case from the protection of privilege.

Both occasions on which the publication in this case was made were privileged; that is to say, it was the right of the sureties to receive, and it was the reasonable duty of the defendants to give all proper information bearing upon the claim made by the bank against the sureties. The

occasion, therefore, justified the bank in disclosing the facts relating to the alleged defalcation of the cashier, and even if the bank was misinformed, and there had been no defalcation in fact, such information was privileged, and the cashier could have maintained no action unless, perhaps, in respect to the first publication on proof of actual malice. But the incorporation into the publication of the statement that the teller acted in collusion with the cashier was, so far as appears, wholly irrelevant and unnecessary. The teller was not a party to the bond or to the suit. There was no issue which called for an investigation of the teller's conduct. The information that the teller had been in complicity with the cashier was not in response to any inquiry made by the defendant. The information did not on its face explain, or tend to explain or establish, any fact relevant to the defendants' case against the sureties, nor can it be seen how knowledge of the fact communicated would be of advantage to the sureties. If upon any ground the information was relevant or material, as no such ground appears on the face of the publication, we are not at liberty to assume its existence. The burden of showing its relevancy under the circumstances was upon the defendants. It is not impossible that a narration on the trial, of the facts as to the defalcation of the cashier, might incidentally involve a disclosure of the acts of the teller; but this did not, we think, justify the defendants in the publication in advance of the defamatory matter as to the teller, not so far as appears, having any relevancy to the liability of the sureties on their bond. *Prima facie* the publication was not privileged.

The ordinary consequence follows that malice is presumed from the defamatory nature of the publication, and the defendants must rely for their defence upon a justification (which was not attempted) or upon proof in mitigation of damages. The cases of Klinck *v.* Colby, 46 N. Y. 427, and Marsh *v.* Ellsworth, 50 id. 309, are not inconsistent with the conclusion we have reached. Both cases recognize the

rule that the question of privilege depends upon there being a lawful occasion for speaking and the use of words pertinent to that occasion.

The conclusion reached requires a reversal of the judgments at the Circuit and General Term, and a direction for a new trial.

O'BRIEN, J. (dissenting). The plaintiff appeals from a judgment of $200 in his own favor, recovered in an action for damages by reason of the publication of an alleged libel. A reversal of the judgment is sought upon the ground that certain rulings made at the trial were erroneous, and so prejudiced the plaintiff's case that the verdict was wholly inadequate to the injury sustained. One of the most prominent of the rulings complained of is the admission of proof, in behalf of the defendant, of the names of the directors who had charge of the management of the defendant at the time of the publication of the paper which is the subject of the action. The General Term was of the opinion that the publication was privileged; and as the plaintiff was not, upon the facts, entitled to recover anything in this view, the rulings, even if wrong, were immaterial. The point was raised by the defendant at the trial, by motion for a non-suit at the close of the plaintiff's case, and again before the case was sent to the jury. If the views of the court below, concerning the character of this publication, are correct, it must be admitted that the plaintiff has no just ground to complain, having recovered a small verdict when he was not entitled to any. In order to get a clearer view of the question a brief statement of the facts is necessary. During many years prior to September, 1882, the plaintiff was employed by defendant as its teller, and during the same, or a part of the time, one Wellington was its cashier, but their relations as officers or employees of the defendant terminated about that date. The cashier had given a bond for the faithful performance of his duties, and the defendant claimed that the sureties were liable thereon for the reason

that the cashier had abstracted or misapplied the funds of the bank, and was in default in his accounts as such cashier in a sum amounting to several thousand dollars. The bond was signed by the cashier and five persons as sureties, of whom one, John M. King, died prior to the alleged breach thereof by the cashier, or prior to its discovery, and his daughter, Mrs. Daniels, and one Ends were appointed administrators. In the month of June, 1883, suit was brought by the bank on this bond, and the personal representatives of the deceased surety above named were made defendants with the other sureties, one of whom interposed an answer. The defendant thus answering procured an order from the court requiring the bank to furnish a bill of particulars of its claim, which was furnished, verified by the defendant Gleason, the new cashier of defendant, January 2, 1884, and served by the attorneys for the bank on the attorneys who appeared for the surety answering about the same date. This is the paper containing the libellous matter upon which the complaint in this suit is based. It was entitled in the action by the bank against the sureties, and contained a detailed statement of the items and dates of the funds which it was claimed the defaulting cashier had misappropriated. Some of the items were distinguished from the rest by a heading in these words: "Cash items drawn from the bank by collusion with the teller, without the knowledge of the officers of the bank." These items were quite numerous, and amounted in the aggregate to $16,621.95. Before the service of this paper and shortly after the commencement of the suit on the bond by the bank, Judge Daniels, in behalf of his wife, who was a defendant, as administratrix of her father, one of the sureties, called at the bank and requested Gleason, the cashier, to furnish him a statement of the claim of the bank upon the bond, in order, as he states, "to get a more complete account of the misappropriations." He told the cashier that he wanted as complete a statement as he could get "so that he could see how we stood," and

"what the facts were." After some further conversation the cashier promised to make such a statement, which he did, in substantially the same form as the bill of particulars in the suit, and Judge Daniels, on a day subsequent, called again, and it was delivered to him, either by the cashier himself or some one in his presence. There is no dispute as to these facts, from which it will be seen that the only reference to the plaintiff, contained in the statement, is through the use of the words "by collusion with the teller." The plaintiff's case, then, must stand, if at all, upon the publication of this paper on two different occasions and in two ways: first, by the delivery of the same to Judge Daniels, who was interested in the claim upon the bond, and who had the right to inquire as to all the facts, by the cashier of the defendant, with a corresponding right and duty; and again by the delivery of the paper by defendant to its attorney in the suit upon the bond for service in the regular course of judicial proceedings and in compliance with an order directing a bill of items to be served. It is necessary, therefore, to refer to what, in the law of libel, is known as two classes of privileged communications, namely, where the party publishing and the party to whom delivered have a common interest in the matter to which the publication relates, and such publications as are made in the conduct and progress of a suit in a court of justice. The bill of particulars was but an amplification of the pleadings, and stands upon the same ground as the complaint would had the bank been required by order to make it more definite and certain. In this class of publications the privilege is said to be as broad and absolute as in the case of words spoken by a member of a legislative body, however false and malicious the statement may be, providing it be relevant and pertinent to the issue or question involved. Hastings *v.* Lusk, 22 Wend. 410; Odger on Libel & Slander, 190–192.

The privilege attached to the class first mentioned is not absolute but conditional and *prima facie* only, and can

always be overcome by proof on the part of the plaintiff of express malice. Publications between parties relating to matters of business in which they have a mutual interest, differ from those in judicial proceedings in respect to privilege in a very important particular. In the former case the party injured by defamatory words may still maintain an action, for the privilege only puts upon him the burden of proving malice in fact, while in the latter class the privilege is an absolute bar, however false and malicious the publication may in fact be. But the broader and more absolute privilege which the law gives to defamatory publications made in the course of judicial proceedings, must necessarily include the minor and more limited privilege which attaches to such publications when made between parties mutually interested in matters of business or of a confidential nature. Hence, if the publication in question, made to Judge Daniels, was privileged, it must necessarily follow that the delivery by the defendant of the same paper to its own attorney, who had charge of the suit upon the bond, for service in compliance with an order of the court, is protected by at least a like privilege because the occasion of the publication and the circumstances under which the paper was delivered removes the presumption of malice as much in the one case as in the other. The question then is whether the delivery by the defendant of the paper to Judge Daniels, under the circumstances disclosed by the evidence, was a privileged communication. Malice is an essential element to justify a recovery in any action to recover damages for a libellous publication. There are different modes of proving it, according to the circumstances under which the publication is made. In the case of defamatory publications, not privileged, the law infers or presumes malice; *but if the publication be privileged*, and the privilege is not absolute, the plaintiff must prove malice in fact like every other essential fact in the case. If the publication in this case is of such a nature and was made under such circumstances as to remove the legal presumption of

malice, the plaintiff was not entitled to recover, as it is not claimed that he gave any proof from which malice in fact could have been found. Privileged communications of the character now under consideration have been the subject of definition by courts and text-writers since actions of libel and slander were known. It is sufficient for all purposes of this appeal to refer briefly to what this court has held from time to time on that question. In Lewis *v.* Chapman, 16 N. Y. 374, Judge Selden, speaking for the court, said: "Where the communication is made *bona fide*, in answer to inquiry from one having an interest in the information sought, or where the relation between the parties by whom and to whom the communication is made is such as to render it reasonable and proper that the information should be given, it will be regarded as privileged." In Klinck *v.* Colby, 46 N. Y. 427, Judge Folger, speaking for the court, said that a privileged communication was one where "the occasion on which it was made rebuts the inference arising, *prima facie*, from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite and ill will," and that "such an occasion is when a communication is fairly made by a person in the discharge of some private or public duty, legal or moral, or in the conduct of his own affairs in matters where his interests are concerned." And again, "a written communication between private persons concerning their own affairs is *prima facie* privileged, and though all that was said is under mistake, yet the words are not, for that reason alone, actionable. . . . Where both the party making and the party receiving the communication have an interest in it, it has never been doubted that it was privileged."

In Hamilton *v.* Eno, 81 N. Y. 116, Judge Folger, again speaking for the court on this point, said: "There are certain communications which are privileged and *prima facie* excusable because of the occasion; that is, they will not be deemed libellous, though the party making them may not

be able to prove them to be true, and may in fact be wrong in thinking them to be so. The effect of the privilege is this: That the law will not imply malice from the fact of the publication, and without malice, express or implied, there is no libel. To make the author of the charge liable in such case, actual malice must be shown to have moved him." In Byam *v.* Collins, 111 N. Y. 143, Earl, J., giving the opinion of the court as to what constituted a privileged communication, quoted the definition given by Lord Campbell in Harrison *v.* Bush, 5 Ellis & Black, 344: "A communication made *bona fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged if made to a person having a corresponding *interest* or duty, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." It will be seen from these cases and others that might be cited that the privilege does not depend upon the caution which the person making the communication uses in the selection of proper words, or his care in avoiding the use of matter not strictly relevant or pertinent, but upon the occasion and the circumstances that gave rise to the statement. The publication may be false and defamatory, and a court might be able to see that it was unnecessary and irrelevant. Yet it is privileged if made under such circumstances and on such occasion as to remove from it the legal inference and presumption of malice, and a recovery can be had only when express malice is proved. Vanderzee *v.* M'Gregor, 12 Wend. 545; Washburn *v.* Cooke, 3 Den. 110.

The case of Klinck *v.* Colby, *supra*, cannot be distinguished from this, either in the principle decided or in its general features upon the facts. In that case certain New York merchants signed a paper in which they stated that they had "been robbed and swindled" by six persons named therein, and they agreed mutually to bear the expenses of

prosecuting them criminally, and to contribute equally towards the payment of any judgment recovered against any of the parties signing the paper, arising by reason of any criminal complaint made against the accused persons by any of the signers. This court held that the publication was privileged, and no recovery could be had without proof of express malice. In its legal and moral features, that case, as it seems to me, was much stronger for the plaintiff than the one at the bar. That paper was an agreement on the part of the defendants to furnish money for the expenses of a prosecution on a charge of crime, a duty which devolves upon the public authorities, while in this case the papers are delivered by the cashier or some employee of a bank to a person interested in the payment of a claim which it held. Granting that the purpose and motive of furnishing money to aid in the punishment of a crime may be lawful and even laudable, it is still difficult to see why the use of the terms "robbed and swindled" were at all necessary or relevant. While the court said that they were not irrelevant, it is plain enough that the decision went upon the ground that the circumstances under which the publication was made removed the presumption of malice. The argument of the learned counsel for the plaintiff assumes that the privilege does not exist if the reference to the plaintiff was not germane to the subject of the inquiry. If it be conceded that the reference to the plaintiff was unnecessary and irrelevant, yet it was published on an occasion and under circumstances that rendered the whole paper *prima facie* privileged, and even a statement not strictly relevant, in the view of this court, is not actionable except upon proof of actual malice. And the mere publication of the paper on the occasion and under the circumstances described did not prove that fact. Moreover it is not quite clear that the statement was irrelevant, and so known and understood by the parties. The application of Judge Daniels called for all the facts and as full a statement as he could get, and in response to that the defendant might properly state the

manner of the defalcation, and the persons who were supposed to have aided in it without responsibility except upon proof of express malice. The answer alleged that there was a prior defalcation known to defendant and not disclosed to the sureties; an allegation which called for a full statement as to the manner in which the funds were abstracted, and that fact concealed. And, certainly, the reference to the plaintiff in this paper was as relevant and pertinent to the general subject as was that designating the plaintiff as one who had "robbed and swindled" contained in the paper in Klinck *v.* Colby, *supra*. In such cases it is the actual malicious intent, and not the strong or irrelevant words, that constitutes the libel, and in this case such intent was not established. The inference arising from the circumstances was sufficient to repel all presumptions of malice, and, therefore, the burden was put upon the plaintiff to show that it existed in fact. The learned counsel for the plaintiff may possibly be correct in his position, that the defendant could have transacted its business with Judge Daniels and its own attorneys without making any such reference to the plaintiff as it did, but that circumstance is of no importance except in support of an allegation of express malice. In the language of Judge Selden, in Lewis *v.* Chapman, *supra*, "All that is necessary to entitle such communications to be regarded as privileged is that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others." It has been held that no action lies against a party who, in the course of a legal proceeding, makes an affidavit in support of a summons taken out in such cause which is scandalous, false, and malicious, though the person scandalized, and who complained, was not a party to the cause. Henderson *v.* Broomhead, 4 H. & N. 569.

There is no good reason for limiting or weakening the rule of privilege applicable to publications made by one to

another in regard to matters of business in which both are interested. Whenever such occasions are used as a cover to gratify personal spite, by intentionally or wantonly assailing personal reputation, ample redress can always be given to the injured party upon proof that the publication was actually inspired by malicious motives, and this is sufficient for every purpose of justice. The General Term was correct in holding that the matter was privileged, and its judgment should be affirmed.

All concur with ANDREWS, J., except EARL and O'BRIEN, JJ., dissenting.

Judgment reversed.[1]

SAMUEL ROTHHOLZ, Plaintiff in Error, *v.* OLIVER R. DUNKLE, Defendant in Error.

Court of Errors and Appeals of New Jersey, 1891.

[*Reported in* 53 *N. J. L.* 488.]

On error to the Supreme Court.

FOR the plaintiff in error, *August Stephany.*
For the defendant in error, *Howard Carrow.*
The opinion of the court was delivered by

VAN SYCKEL, J. This is an action for damages for an alleged libel contained in the following letter, written by Oliver R. Dunkle, the cashier of the Merchants' Bank, of Atlantic City:

"ROBERT OHNMEISS, Esq.:

"Enclosed please find one share of Merchants' stock, received some time ago. Our board refuses to purchase at present, but hold under advisement. We have stricken

[1] Compare Cutler *v.* Dixon, 4 Co. 14 b (1585); Buckley *v.* Wood, 4 Co., 14 b (1591); Lake *v.* King, 1 Saund. 131 b (Pasch. 21 Car. II.); Fray *v.* Blackburn, 3 B. & S. 576 (1863); Scott *v.* Stansfield, L. R. 3 Ex. 220 (1868).

your name from the bond of Mr. Carl Voelker, by request; also, Samuel Rothholz's, as the latter has no financial standing.

"Respectfully,

"O. R. DUNKLE, *Cashier.*"

Robert Ohnmeiss was a stockholder in the same bank, and he and Rothholz, the plaintiff, were sureties on the official bond of Carl Voelker, an employee of the bank.

Previous to the writing of this letter, Ohnmeiss had requested Dunkle to have his name stricken from the said bond, but did not make any inquiry with respect to the plaintiff, Rothholz.

At the close of the plaintiff's case, the trial judge, regarding the communication a privileged one, ordered the plaintiff to be called.

Whether, under the given circumstances, the non-suit should have been ordered, is the sole question in this court.

The statement that the plaintiff had no financial standing was libellous, and constituted a legal foundation for the recovery of damages, unless the occasion upon which it was uttered gave rise to the privilege of publishing what would otherwise be actionable.

The term "privileged," as applied to a communication alleged to be libellous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the falsity of the charge.

This court, in King *v.* Patterson, 20 Vroom, 419, declared "that a communication, made *bona fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be actionable."

In the case cited, the learned judge who delivered the

opinion of the court referred, with approbation, to Lawless *v.* Anglo-Egyptian Oil Company, L. R. 4 Q. B. Div. 262, and to P., W. & B. R. R. Co. *v.* Quigley, 21 How. 202.

The first of these cases was an action for libel against a corporation for publishing a report made to the company by auditors in their audit of the manager's accounts, reflecting upon the plaintiff. The report was submitted at a general meeting of the shareholders of the company, and under a resolution of the meeting was printed and circulated among the shareholders. The court held that, inasmuch as it was the interest of all the shareholders to be informed of the report, the publication was privileged, on the ground, as Mellor, J., said, "that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous."

In the second case, a report, made to stockholders in writing and printed, with respect to the capacity and skill of one of the company's employees, was held to be a privileged communication. These cases are referred to for the purpose of showing that a communication to a shareholder of a corporation, touching matters which concern the corporate body, are within the rule of privilege, which secures immunity to the official who makes the publication.

Ohnmeiss, being not only a co-surety with Rothholz upon the official bond of Voelker, but also a shareholder in the bank, he had the right to receive the information imparted to him by Dunkle, the cashier. The fact that Rothholz's name had been taken from a bond held by the bank, and the reason for removing it, was a matter which concerned Ohnmeiss. As a stockholder, he could justly have complained if a competent security had been improperly surrendered by those who conducted the affairs of the bank.

It was not necessary, to justify the communication, that it should have been in response to an inquiry made by Ohnmeiss.

In Waller *v.* Lock, 45 L. T. N. S. 243, Jessel, Master of the Rolls, says: "If an answer is given in the discharge of a social or moral duty, or if the person who gives it thinks it to be so, that is enough; it need not even be an answer to an inquiry, but the communication may be a voluntary one."

In my judgment, the circumstances under which the letter was written, upon which this suit is based, repel the inference of an improper motive on the part of defendant, and cast upon the plaintiff the burden of proving malice. No evidence having been produced in the trial court to show malice in the publication, the non-suit was properly ordered, and the judgment below should be affirmed.

For affirmance — The Chancellor, Chief Justice, Depue, Dixon, Garrison, Knapp, Magie, Scudder, Van Syckel, Brown, Clement, Smith, Whitaker. 13.

For reversal — None.

BLISS *v.* HALL.

Common Pleas, 1838.

[*Reported in* 4 *Bing. N. C.* 183.]

The declaration stated that the defendant wrongfully and injuriously exercised and carried on in and upon the messuages of the defendant, being contiguous and near to the messuage of the plaintiff, the trade or business of a candle-maker or manufacturer of candles; and did then and there, to wit, on, &c., in and upon the said messuages of the defendant, wrongfully and injuriously melt and prepare, and caused to be melted and prepared for the making and manufacturing of candles, divers large quantities of grease and tallow; and did then and there, to wit, on, &c., in and upon the said messuages of the defendant, wrongfully and injuriously make and manufacture, and cause and procure to be made and manufactured divers large quantities of candles: by means of which several premises, divers noi-

some, noxious, and offensive vapors, fumes, smells, and stenches, on the several days and times aforesaid arose, issued, and proceeded from the said messuages of the defendant, and spread and diffused themselves over and upon and into and through and about the said messuage of the plaintiff; and the air in, over, through, and about the same was thereby then greatly filled and impregnated with the same noisome, noxious, and offensive vapors, fumes, smells, and stenches, and was then rendered and from thence hitherto had been, and still is, greatly corrupted, offensive, disgusting, unwholesome, and uncomfortable.

Plea, that the defendant was possessed of his said messuages for a long space of time, to wit, for the space of three years next before the plaintiff became possessed of his said messuage in the declaration mentioned, and before the plaintiff occupied, inhabited, and dwelt in the same; and that before and at the time when the defendant first became and was possessed of his said messuages, the said furnaces and stoves in the introductory part of this plea mentioned had been and then were erected, set up, and placed in and upon the same: that the defendant always, to wit, from the time at which he became so possessed of his said messuages, until and at and after the plaintiff so became possessed of his said messuage as in the declaration mentioned, and thence hitherto, had used, exercised, and carried on the said trade and business of a candle-maker, and had occasioned — the phenomena described in the declaration (enumerating them as above) — in the same manner and form and degree, and to the same extent, and at the same hours and times and seasons, as at the said time when, &c., in the declaration and in the introductory part of this plea mentioned; and the same during all that time and at the said time when, &c., were and still are requisite and necessary to enable the defendant to carry on his said trade and business, in and upon his said premises, in the same manner and form, and to the same extent, as the defendant carried on the same at the time when the

plaintiff came to his said premises in the declaration mentioned, near and adjoining to the premises and business of the defendant, so carried on as aforesaid: that the defendant lawfully enjoyed his said premises, manufactory, and business, before the plaintiff came to, occupied, or was possessed of his said premises in the declaration mentioned, in the same condition, extent, manner, and form, as he enjoyed and possessed the same at the said time when, &c., in the declaration mentioned, and of right ought still lawfully to enjoy the same without interruption or suit of the plaintiff; and that, the defendant was ready to verify.

Demurrer and Joinder.

Butt, in support of the demurrer, cited Elliottson *v.* Feetham, 2 New Cases, 134, as an authority, that it is no defence to an action for a nuisance to plead that the defendant was possessed of certain premises, and created and carried on the nuisance before the plaintiff came to occupy the adjoining premises.

Hoggins, contra. The defendant's business is lawful: Com. Dig. Action on the case for a nuisance. — "An action upon the case lies for a nuisance to the habitation or estate of another; as, if a man erect anything offensive so near the house of another that it becomes useless thereby, as a swine-sty or a tallow furnace. But if he be a chandler, *quære.*"

But even if it be a nuisance, a party who comes to it is not entitled to complain. It was his own election to approach so near. [TINDAL, C. J. Obstructing a watercourse is a nuisance: could the wrongdoer say in answer to a complainant, "I stopped the water before you came below"?] The complainant there would object in respect of the estate of his predecessor, who might have had an immemorial right to the water; here, for aught that appears to the contrary, the defendant was the first occupier in the district. There must be some places in which such a business may be carried on; and when it is set up before other houses are built, those who erect them must do so sub-

ject to the rights of the first occupier to carry on a lawful business.

TINDAL, C. J. In this case the declaration alleges that the defendant injuriously carried on, in messuages contiguous to the messuage of the plaintiff, the trade and business of a candle-maker, by which noxious vapors and smells proceeded from the messuage of the defendant and diffused themselves over the messuage of the plaintiff; and all that the defendant says in answer, is, that he carried on the business for three years before the plaintiff became possessed of the messuage he inhabits. That is no answer to the complaint in the declaration; for the plaintiff came to the house he occupies with all the rights which the common law affords, and one of them is, a right to wholesome air. Unless the defendant shows a prescriptive right to carry on his business in the particular place, the plaintiff is entitled to judgment.

PARK, J. In Elliottson *v.* Feetham the court said that the defendant should at least have alleged a holding of twenty years' duration: here he does not go beyond three.

VAUGHAN, J. The smells and noises of which the plaintiff complains are not hallowed by prescription, and under this plea the defendant cannot justify their continuance.

BOSANQUET, J. I am of the same opinion. The defendant has, *prima facie*, a right to enjoy his property in a way not injurious to his neighbor; but here on his own showing the business he carries on is offensive, and he makes out no title to persist in the annoyance.

Judgment for the plaintiff.[1]

[1] Compare Hurlbut *v.* McKone, 55 Conn. 31 (1881); People *v.* White Lead Works, 82 Mich. 471 (1890); Laflin & Rand Powder Co. *v.* Tearney, 131 Ill. 322 (1890).

FISH *v.* DODGE.

Supreme Court of New York, 1847.

[*Reported in* 4 *Denio*, 311.]

ERROR to Albany C. P. Dodge sued Fish in the Albany justices' court, and declared in a special action on the case for a nuisance, for that the defendant by manufacturing steam-engine boilers adjoining the dwelling-house of the plaintiff in Beaver Street in the city of Albany, created a great noise and dust, whereby the plaintiff was injured in her property and peaceable enjoyment of her said dwelling, and whereby her boarders were forced to leave her, — the said plaintiff then and there keeping a boarding-house; to the damage of the plaintiff of one hundred dollars. The defendant pleaded the general issue; and there was a verdict and judgment for the plaintiff for $100 damages. The defendant appealed. On the trial in the C. P. it appeared that in the years 1844 and 1845 the plaintiff kept a boarding-house on the north side of Beaver Street in the city of Albany. The defendant was a blacksmith, and carried on his business in a building west of, and adjoining the plaintiff's house. On the 1st of May, 1845, the defendant rented the east end of his building or shop, being the end adjoining the plaintiff's house, to the firm of Jagger, Treadwell & Perry, until the 1st of September following at a fixed rent, with the understanding that they might occupy longer in case they should find it necessary, and might, if necessary, occupy a larger portion of the shop than was first agreed upon, paying reasonably therefor. Messrs. Jagger & Co. told the defendant, when they hired the premises, that they wanted to finish steam-boilers there. They occupied the premises from the 1st of May until October following, and paid to the defendant $70 or $75 for rent. The defendant carried on his business in the shop at the same time. The

steam-boilers were made by the workmen of Jagger & Co., and for their use, — the defendant having no interest in them. There was no partition in the shop, and the hands of Jagger & Co. could go where they pleased. One of them sometimes worked at the same fire with the defendant. The defendant kept the key of the shop.

In manufacturing the steam-engine boilers there was a tremendous noise and pounding, commencing about six o'clock in the morning, and continuing until sundown. Immense quantities of dust arose from the work in the shop, which penetrated the plaintiff's house, settled upon the curtains and furniture, and filled the air of the house, making it difficult to breathe. It prevented the opening of windows, and deprived the plaintiff of the use of the yard for drying clothes. In July the plaintiff complained to the defendant of the nuisance; the defendant answered that it would not last much longer, but would be stopped soon. It continued from the 1st of May until October. In consequence of the noise and dust the plaintiff lost several of her boarders. The plaintiff was not annoyed by the business carried on by the defendant; but only by the work upon the boilers.

After proving by Sarah Freleigh the injury complained of, the plaintiff asked her, what in her opinion was the amount of damage. The defendant objected to the question; but the court overruled the objection, and the defendant excepted. The witness answered that the damage could not have been much less than $100 on account of boarders, and $100 more on account of the dust, inconvenience, and routine of expenses. On cross-examination she said that in her testimony on a former trial of the cause she estimated the damage from dust, labor, smut, &c. at $50.

A motion was made for a non-suit on the grounds, 1. There was no proof that the defendant had done or caused to be done anything which was a nuisance, or for which he was liable; 2. If the defendant was liable on the facts proved, the declaration — charging that the defendant by

manufacturing boilers created the noise and dust — did not meet the case proved, and the plaintiff could not recover under the pleadings. The court overruled the motion, and held the defendant liable. Exception.

The court charged the jury, that though the business of manufacturing steam-boilers was not a nuisance or in any way illegal, it might become such, either by the manner of conducting it, or by locating the scene of its great noise, dust, and smoke in the immediate vicinity of, or in contact with a dwelling-house in the heart of a city or elsewhere; that what was done in this case to the annoyance of the plaintiff was a nuisance; and if the jury believed from the evidence that the defendant let the premises to Jagger & Co. with knowledge of the purpose, and for the purpose of manufacturing and repairing steam-boilers; and if they believed that the plaintiff sustained damages by the manufacturing of the boilers in this case, she was entitled to a verdict for all actual damages; and the jury could find more than $100, the amount stated in the declaration. Exception.

The defendant requested the court to charge, 1. That under the pleadings the defendant is not liable unless he manufactured the boilers, or caused them to be made for his benefit, or by his direction, or in his business; 2. That the nuisance complained of is the doing of a lawful and not necessarily offensive business, in a noisy and dusty manner, and that for such an injury the landlord or owner of the premises is not liable; 3. That neither the act complained of, nor its consequences constitutes a nuisance for which an action can be sustained. The court refused so to charge, and the defendant excepted. The jury found a verdict for the plaintiff for $150 damages, for which sum, and costs to $54.66, judgment was rendered. The defendant brings error.

C. M. Jenkins, for the plaintiff in error. 1. The defendant below was not liable for the unlawful acts of his lessees. The shop was let for a lawful business; and if

that business, lawful in itself, was carried on in such a manner as to become a nuisance, the actual offender is alone liable. The court in its charge erroneously assumed that manufacturing steam-boilers was, under all circumstances, a nuisance. Stephens' N. P. 2366; Brockway *v.* The People, 2 Hill, 558. 2. But if the defendant is liable on the case proved, that case should have been stated in the declaration; instead of which the defendant is charged as the party carrying on the business of manufacturing the steam-boilers. 3. It was erroneous to permit the witness to give her opinion as to the amount of damages. Norman *v.* Wells, 17 Wend. 136. 4. The plaintiff could not recover a larger amount of damages than was claimed in the declaration, and the charge in that particular was erroneous; and that error also appears on the record independently of the bill of exceptions. 2 W. Black. 1300; 1 Bulst. 49; Dox *v.* Dey, 3 Wend. 356, 362.

S. H. Hammond, for the defendant in error. 1. No prejudice could arise to the defendant from allowing a witness whose situation peculiarly qualified her to judge, to estimate the amount of damages. 2. There was no variance. If the defendant was liable, it was on the ground that the injury was committed by him through the agency of another. 3. In cases tried in the common pleas, by appeal, the plaintiff may recover an amount beyond the jurisdiction of the justice, which necessarily shows that he may recover more than is claimed in the declaration. Jackson *v.* Covert, 5 Wend. 139. 4. The defendant was liable under the circumstances of the case, and the charge was correct. Where a nuisance is maintained by a tenant, the lessor is liable. Rosewell *v.* Prior, 2 Salk. 460; Selw. N. P. by Wheaton, 1140; Christian Smith's Case, Sir W. Jones, 272; Leslie *v.* Pounds, 4 Taunt. 649. So one is liable for a nuisance erected on his land, though the wrongdoer was not his servant. Bush *v.* Steinman, 1 Bos. & Pul. 404; Staple *v.* Spring, 10 Mass. 72. So also if premises are let for the purpose of carrying on a business which is or which be-

comes a nuisance. The People *v.* Townsend, 3 Hill, 479; Commonwealth *v.* Harrington, 3 Pick. 26.

By the Court, BRONSON, Ch. J. It is a rule of the common law that a man should so use his own as not to hurt another; and therefore if one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages. There are many cases in the books where this doctrine has been applied; and among the number are those where a man erects a smith-forge, swine-sty, lime-kiln, privy, or tallow-furnace so near the dwelling-house of another as to render it unfit for habitation. Bradley *v.* Gill, Lutw. 29; Aldred's Case, 9 Coke, 58; Jones *v.* Powell, Hutton, 135; Morley *v.* Pragnell, Cro. Car. 510. It is not necessary to a right of action that the owner should have been driven from his dwelling; it is enough that the enjoyment of life and property has been rendered uncomfortable. Per Lord Mansfield, in Rex *v.* White, 1 Burr. 337. Although the manufacturing of steam-engine boilers is a lawful business, it was carried on in such a manner in this case as to make it a great annoyance to the plaintiff; and she is undoubtedly entitled to redress by action. If the suit had been against Messrs. Jagger & Co., the immediate actors in the wrong, the right to recover would have been quite clear. But whether the defendant is liable is a more difficult question.

It is said that the defendant is liable, because he was the owner of the shop in which the wrong was done; and we are referred to the case of Bush *v.* Steinman, 1 B. & P. 404, where the owner of a house, who had contracted with a surveyor to put it in repair for a stipulated sum of money, was held answerable to a third person who had suffered an injury in consequence of the improper act of one of the workmen in making the repairs, although the workman was neither the servant, nor under the control of the owner of the house. That case has been seriously, and I am in-

clined to think, justly questioned in England. Laugher *v.* Pointer, 5 B. & C. 547.[1] But it is not now necessary to inquire whether it can be supported; for there was not there, as there was here, a tenant in possession of the property; and the repairs were made by, and for the immediate benefit of the owner. When one erects a nuisance, he is answerable for the continuance of it, as well as for the original wrong. And this is so not only where he has demised the property to another with the nuisance upon it and reserved a rent, Rosewell *v.* Prior, 12 Mod. 635, 1 Ld. Ray. 713, and 2 Salk. 460, s. c., but where the erection was made upon the land of another, and he has no right to enter for the purpose of removing it. Thompson *v.* Gibson, 7 Meeson & Welsby, 456. The continuance is a new nuisance; per Sewall, J., in Staple *v.* Spring, 10 Mass. 74. And the party cannot excuse himself by saying it is not in his power to redress the wrong. He must find out some way of putting an end to the injury. But none of the cases go far enough to aid the plaintiff, unless the defendant can be regarded as the author of the nuisance. He did not manufacture the engine-boilers, nor were they made for him. But the jury have found that he let the shop for the purpose of having the boilers manufactured there; and if he knew that it would prove a nuisance to the plaintiff, I think the action may be sustained. One who demises his property for the purpose of having it used in such a way as must prove offensive to others, may himself be treated as the author of the mischief. We held at the last term, that a man who had rented a tenement for the purpose of having it kept as a bawdy-house, and derived an increased rent from that mode of using the property, might be indicted and punished for keeping the house. The People *v.* Erwin, 4 Denio, 129. We think this both good law and good morals. In that case, however, the letting was for a purpose unlawful and wicked in itself, while here the thing to be done was in itself both innocent and lawful. It could only become a

[1] See The Mayor, &c. of New York *v.* Bailey, 2 Denio, 433, 443, 446, per Walworth, Chancellor, and Hand, Senator.

nuisance under special circumstances. For that reason I think the instruction to the jury should have been modified by the additional inquiry, whether, from the nature of the business or otherwise, the defendant knew, or had reason to believe, that the making of steam-engine boilers in his shop would be likely to prove injurious to the plaintiff. The defendant had carried on his business as a blacksmith in the shop, without any annoyance to the plaintiff; and he may have supposed that the making of the boilers would prove equally inoffensive. He cannot be justly charged with the wrong which was actually committed by others, who were not in his employment, unless he knew, or had reason to believe, that he was letting the property for a use which must prove injurious to the plaintiff.

It was clearly wrong to allow the witness to express an opinion as to the amount of damage. Norman *v.* Wells, 17 Wend. 136, 161. It was the business of the witness to state facts; and of the jury to assess the damages.

The jury assessed the damages at a sum beyond the amount laid in the declaration; and the plaintiff, instead of remitting the excess, as should have been done, and taking judgment for the residue, has entered a judgment for the whole amount of damages found by the jury. This is error. Curtiss *v.* Lawrence, 17 John. 111; Dox *v.* Dey, 3 Wend. 356; Hoblins *v.* Kimble, 1 Bulst. 49; Cheveley *v.* Morris, 2 W. Black. 1300; 1 Chit. Pl. 372, ed. of '37. The plaintiff relies on the case of Jackson *v.* Covert, 5 Wend. 139, but it does not touch the question. The point discussed there, though not necessarily decided, was, whether on appeal by the defendant from the judgment of a justice, the common pleas can give judgment for a sum exceeding the jurisdiction of the justice's court. Not a word was said about a judgment for damages beyond the amount laid in the declaration; and clearly the court did not intend to depart from the settled law on that subject.

Judgment reversed.[1]

[1] Compare Gwinnel *v.* Eames, L. R. 10 C. P. 658 (1875); Tomle *v.* Hamvton, 129 Ill. 379 (1889). See Wam. St. Cas. § 25.

BAMFORD v. TURNLEY.

Queen's Bench, 1860.

[*Reported in* 3 *B. & S.* 62.]

THE first count of the declaration stated that the plaintiff was possessed of a messuage and dwelling-house and premises, with the appurtenances, situate at Norwood, in the county of Surrey, in which he dwelt, with his family and servants; and that the defendant, contriving and intending to injure and annoy the plaintiff, erected and made certain brick-kilns upon certain land of the defendant adjoining and near to the messuage and dwelling-house and premises of the plaintiff, and wrongfully and injuriously burned a large quantity of bricks in the brick-kilns, and caused noxious and unwholesome vapors, smokes, fumes, stinks, and stenches to rise and proceed from the brick-kilns, and to enter in, spread and diffuse themselves over, upon, into, through, and about the messuage and dwelling-house and premises of the plaintiff, and the air over, through, and about the same was thereby greatly impregnated and filled with the said noxious and unwholesome vapors, fumes, stinks, and stenches, and was rendered and became and was corrupted, offensive, unwholesome, unhealthy, and uncomfortable; and thereby the plaintiff had been greatly annoyed and inconvenienced in the possession and enjoyment of his messuage and dwelling-house, also, by means of the corrupt, unwholesome, and unhealthy state of the air in and over and about the plaintiff's dwelling-house so occasioned, the plaintiff and his family and servants became and were sick and ill, and so continued for a long time, and the plaintiff had necessarily incurred a great expense in and about obtaining necessary medical advice, and was otherwise greatly injured and prejudiced.

The second count of the declaration complained of a similar nuisance by the defendant's placing a quantity

of decomposed ashes and bones in the immediate neighborhood of the plaintiff's house.

The only material plea to both counts was not guilty, upon which issue was joined.

On the trial, before Cockburn, C. J., at the summer assizes at Guildford, 1860, it appeared that in the month of June, 1857, some land at Norwood, part of the Beulah Spa estate, was offered for sale in lots by public auction in accordance with certain printed particulars and conditions of sale. The particulars were headed "Particulars of the first section of the Beulah Spa estate, consisting of about fifty acres of Freehold Building Land, etc., in nineteen lots," and stated, among other things, that the property presented "splendid sites for the erection of first-class villas;" and it was added, "There is abundance of brick earth and gravel which, combined with all the other advantages appertaining to this exceedingly beautiful property, present an unusually advantageous opportunity of carrying out safe and profitable building operations." Capt. Edward Strode, the brother-in-law of the plaintiff, in the year 1857, purchased lot 11 of this property, containing 2a. 1r. 33p., and built a residence thereon. The house was finished in the year 1858, and shortly afterwards the plaintiff became the tenant of the house and property. The defendant was a solicitor in London, and in the year 1858 he bought some other lots of the same property under the same particulars and conditions, being respectively lots 1, 10, 14 and 16. It was proved that building was going on in the neighborhood, the plaintiff's house being within ten minutes' walk of the new railway station at Norwood. It also appeared that during the preceding year bricks had been burnt at certain spots in lots 13 and 15, and at a spot adjoining to lot 15. It further appeared that during the last seventeen or eighteen years bricks had from time to time been burnt at various parts of the field, of which the site of the clamp in question then formed part, such field having been divided at the time of the sale

into various lots. It also appeared that bricks had previously been made on the spot where the plaintiff's house stood.

In the month of June, 1860, the defendant, with the view of burning bricks made out of the brick earth found upon his land, and thereby obtaining bricks to build upon it, erected a clamp of bricks on lot 16 at a distance of 180 yards from the plaintiff's house. It was proved that there was an annoyance to the plaintiff arising from the erection and use of the clamp as complained of in the first count, sufficient *prima facie* to constitute a cause of action; but it was also proved that the erection and use of the clamp by the defendant as complained of was temporary only, and for the sole purpose of making bricks on his own land and from the clay found there, with a view to the erection of dwelling-houses on his own land; and that the clamp for burning the bricks was placed on that part of the defendant's land most distant from the plaintiff's house, and so as to create no further annoyance than necessarily resulted from the burning of bricks; and the question was whether, under the circumstances so proved, an action could be maintained in respect of such annoyance.

The Lord Chief Justice intimated that the case came within the principle laid down in Hole *v.* Barlow, 4 C. B. N. S. 334, and directed the jury, upon the authority of that case, that if they thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict upon the first count, independent of the small matter of whether there was an interference with the plaintiff's comfort thereby. Upon this ruling a verdict was by arrangement entered for the defendant on the first count, leave being reserved to the plaintiff to move to set it aside if the court should be of opinion that the above ruling of the Lord Chief Justice was erroneous.

Upon the second count a verdict was by arrangement

entered for the plaintiff with 1*s.* damages, but no question arose on that count.

In the following Michaelmas Term,

Petersdorff, Sergt., moved for a rule calling upon the defendant to show cause why a verdict should not be entered for the plaintiff on the first count for 40*s.* damages.

Per Curiam. (COCKBURN, C. J., WIGHTMAN, HILL, and BLACKBURN, JJ.)

Rule refused, with leave to appeal.

In the Exchequer Chamber, 1862.

[*Reported in* 3 *Best & Smith*, 66.]

THE plaintiff having appealed against the above decision, a case setting forth the facts was stated and concluded as follows: —

"If the court should be of opinion that, upon the facts as stated, the ruling of the Lord Chief Justice, founded upon the decision of Hole *v.* Barlow, was erroneous, the verdict found for the defendant on the first count is to be set aside, and a verdict entered for the plaintiff instead thereof with 40*s.* damages.

"If the court should be of a contrary opinion, the verdict entered for the defendant upon the first count is to stand."

The case was argued in Easter Vacation, May 14th, before ERLE, C. J., POLLOCK, C. B., WILLIAMS and KEATING, JJ., and BRAMWELL and WILDE, BB.

Mellish (with him *Petersdorff, Sergt.*, and *Garth*), for the plaintiff. There is no material distinction between the facts in this case and those in Hole *v.* Barlow, 4 C. B. N. S. 334, but it has been found at *nisi prius* most difficult to apply that decision, and this court will not affirm it.

A convenient and proper place for erecting a brick-kiln must be a place where it will not be a nuisance to any person. It lies on the other side to show what is the extent of the exception to the common-law rule that a person may

not lawfully erect anything even on his own land which will materially disturb his neighbor in the enjoyment of his. It may be that for the sake of trade in towns, or for the public benefit, a nuisance is sometimes justified, such as a tallow-chandler's factory; but the nuisance in the present case was created by the defendant for a private purpose, — viz., burning bricks for building a house for himself, — and the extent of advantage or convenience to the defendant cannot justify the creation of such a nuisance to the plaintiff. The only question is whether there is a real substantial injury to the plaintiff, he being supposed to be of ordinary character and nerves, and with reference to the state of the neighborhood.

The court, in Hole *v.* Barlow, 4 C. B. N. S. 334, refer to 1 Com. Dig., *Action upon the Case for a Nuisance* (C), where it is said that an action upon the case does not lie "for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, etc., use his trade in a convenient place, though it be to the annoyance of his neighbor." But no authority is cited by Chief Baron Comyns; and in order to understand this *dictum*, it is necessary to refer to the instances in which he says the action for a nuisance lies. Thus, he says, Id. (A), the action lies "for a nuisance to the habitation or estate of another," for which he cites authority: "So, if a man erect anything offensive so near the house of another that it becomes useless thereby; as a swine-sty," "or a lime-kiln," "or a dye-house," "or a tallow-furnace. But if he be a chandler, *quære.*" And then he says, Id. (C), "But an action upon the case does not lie upon a thing done to the inconvenience of another; as, if a man erect a mill near to the mill of another; whereby the other loses part of his profit; where the former mill is not *a tempore cujus contrar. etc.*" "If a man set up a school so near my study, who am of the profession of the law, that the noise interrupts my studies." But a lawyer has no more right than another person. [POLLOCK, C. B. There is no founda-

tion for that distinction. ERLE, C. J. The degree of nuisance is always a question for the jury.] But in the present case the way of leaving the question to the jury was wrong, for it is no justification of a nuisance that it is a reasonable use of the defendant's land. [WILDE, B. Suppose a man builds upon his land a house which excludes the light from his neighbor's windows.] No right to light is acquired until twenty years' enjoyment; whereas a man has a right to pure air as soon as his house is built. [WILDE, B. A man has only a right to reasonably pure air.] There are numerous cases in which, if there had been such a rule as is contended for by the defendant, it would obviously have been relied on. In the earliest case,[1] cited in Gale on Easements, 279, 280, which was a writ of "*Quod permittat*" against the defendant for building a lime-kiln near the plaintiff's house, though, as was said in Aldred's Case, 9 Co. 57 *a*, 58 *b*, 59 *a*, "the building of a lime-kiln is good and profitable," it was not suggested that an action would not lie if it was built in a convenient place. In Aldred's Case, 9 Co. 57 *a*, there was no question as to any reasonable right of the defendant to have the hog-sty near the defendant's house. [POLLOCK, C. B. In the first case it was alleged that the smoke from the lime-kiln entered the plaintiff's house, "so that no man could dwell there;" and in Aldred's Case the declaration alleged that the plaintiff and his servants could not remain in the house without danger of infection from the hog-sty.] In Jones *v.* Powell, Palm. 536, 539, s. c. Hutt, 135, Hide, C. J., said a tan house was necessary, for all persons wear shoes; nevertheless it may be pulled down if it be erected to the nuisance of another. In Rex *v.* Pierce, 2 Show. 327, it was held that the trade of a soap-boiler, though such a trade was honest and might be lawfully used, could not be carried on to the annoyance of the neighborhood. In Walter *v.* Selfe, 4 De G. & Sm.

[1] Assis. 4, 6 *b*, pl. 3.

315,[1] Knight Bruce, V. C., granted an injunction under circumstances very similar to those in the present case. In 1 Rol. Abr. 86, pl. 7, *Action sur Case* (N), *Nusans*, Poynton *v.* Gill is cited, which was an action on the case against the defendant for raising the chimney of a lead smelting-house near the close of the plaintiff, so that the grass and trees of the close were corrupted by the smoke from the chimney, and thereby the plaintiff lost the grass and trees, and also two horses and a cow which were depasturing in the close; and it was held that though the trade was legal, and for the benefit of the public, and necessary, the action lay, because the trade might be carried on in waste places, and large commons remote from enclosures, so that no loss or damage would arise from it to the owners of adjoining land. [He also cited Anon., 1 Ventr. 26]. In actions for corrupting water-courses it has never been alleged that the convenience of the defendant is to be considered. [POLLOCK, C. B. Water in the smallest degree corrupted is rendered useless for domestic purposes. Causes of action have arisen, as in Priestley *v.* Fowler, 3 M. & W. 1, which nobody in Westminster Hall dreamed of: why may not defences to this class of actions arise as we become more familiar with the exigencies of society?] It is for the public advantage that no nuisance be committed; and landowners and others interested in works which are injurious to their neighbors will find means of avoiding the creation of nuisances.

The cases in which the doctrine that a person who comes to a nuisance has no right of action, which is found in 2 Bl. Comm. 402, was exploded, are in favor of the plaintiff. [He cited Bliss *v.* Hall, 4 Bing. N. C. 183, 186; s. c. 5 Scott, 500, 504, per Tindal, C. J.] [WILLIAMS, J. In 16 Vin. Abr. p. 27, *Nusance*, G, pl. 18, in the margin, it is said: "Where there has been an ancient brew-house time out of mind, although in Cheapside or Fleet Street,

[1] Affirmed on appeal, see 4 De G. & Sm. 326. — REPORTER.

etc., this is not any nuisance, because it shall be supposed to be erected when there were no buildings near; *contrà*, if a brew-house should be now erected in any of the streets or trading places; this shall be a nuisance, and an action on the case lies for whomsoever shall receive any damage thereby; and accordingly, in an action brought by one Robins, a lace-man in Bedford Street, against a brewer for a nuisance from the brew-house to the goods in his shop (it being a brew-house of ten years' standing), the jury gave for two years' damages £60. L. P. R. Nusance, 246, cites Trin. 8 W. 3, C. B. Robins's Case."]

The exception laid down for the first time in Hole *v.* Barlow, 4 C. B. N. S. 334, was not recognized in The Stockport Water Works Company *v.* Potter, 7 H. & N. 160.

Lush (with him *Honyman*), for the defendant. The decision in Hole *v.* Barlow, 4 C. B. N. S. 334, was approved by Martin and Channell, BB., in The Stockport Water Works Company *v.* Potter, 7 H. & N. 160. There are essential differences between the present case and The Stockport Water Works Company *v.* Potter; in that case the nuisance was permanent, and injurious to health by corrupting the water of a public stream with poisonous compounds, and there was no evidence that the defendants took any precautions to prevent the nuisance from their calico printing works. In the present case the plaintiff and defendant stand in a peculiar relation to each other as purchasers of adjoining plots of ground, both of which were laid out and purchased as building ground, and one inducement held out to the purchaser was that there was abundance of brick earth. There is no proposition of law that every person has an absolute right to pure unadulterated air under all circumstances; on the contrary, every person must enjoy his own property subject to the inconvenience necessarily resulting from the reasonable use by his neighbor of his own land. That explains the *dicta* that what is a nuisance in one place may not be so in

another, and that whether a thing is a nuisance or not, depends on the state of the neighborhood. There is no authority against the ruling in Hole *v.* Barlow, 4 C. B. N. S. 334, which in substance involves the above proposition.

In 1 Roll. Abr. 89, pl. 7, *Action sur Case* (N), *Nusans*, the smoke from the smelting-house was destructive to vegetation. In Jones *v.* Powell, Hutt. 135, 136, s. c. Palm. 536, the jury found that the new brew-house and privy were maliciously erected to deprive the plaintiff of the benefit of his habitation and office; but the judges intimated that a reasonable use of either would not be actionable. In Walter *v.* Selfe, 4 De G. & Sm. 315, Knight Bruce, V. C., was put in the position of judge and jury, and he found that the burning of bricks was a nuisance to the plaintiff's house, which was the same proposition as in Jones *v.* Powell. In Rich *v.* Basterfield, 2 C. & K. 257, 258, s. c. *in banc*, 4 C. B. 783, Tindal, C. J., is reported to have said, "No man may use his right so as to damage another; though, on the other hand, every one has a right reasonably to use his property, even if he should thereby annoy his neighbor. [ERLE, C. J. That I think is correct language; but the case was tried before me. WILDE, B. In that *dictum* the term "annoy" is used in contradistinction to "damage."] In the report of the case *in banc*, 4 C. B. 783, the trial is stated to have been before Erle, J.; and according to that report (p. 787) the learned judge left it to the jury to say "whether or not the defendant had exercised his rights in a reasonable manner with reference to the property in question." [ERLE, C. J. The nuisance in that case was the making the tops of the chimney of a shop level with the first-floor windows of the plaintiff's dwelling-house.] In Bliss *v.* Hall, 5 Scott, 500, 506, s. c. 4 Bing. N. C. 183, Vaughan, J., said: "An offensive trade may be a nuisance or not, according to the place in which it is carried on." To constitute a nuisance, the thing done must be injurious to health or comfort and be without excuse, — that is, not in the reasonable use of

a man's property. It is no answer to an action that the plaintiff has come to the nuisance; therefore, if this action is maintainable, a landowner may have erected and used a brick-kiln on his land for many years, and yet a person who subsequently buys an adjoining piece of land and builds a dwelling-house upon it, may require the brick-kiln to be discontinued.

Mellish replied. *Cur. adv. vult.*

WILLIAMS, J., delivered the judgment of ERLE, C. J., KEATING, J., WILDE, B., and himself.

On the argument of this case there was some contest as to what the true question was which the court had to consider. On the part of the plaintiff it was said to have been proved at the trial, beyond dispute, that the burning of the bricks in the kilns of the defendant was a nuisance, and that the point reserved was, whether it was legalized by the other facts which the jury must be taken to have found to exist. On the part of the defendant it was said that the true point was whether, under all the circumstances of the case, the burning of the bricks amounted to an actionable nuisance.

It is not, perhaps, material which of these contentions is correct. For the Lord Chief Justice, at the trial, directed the jury, on the authority of Hole *v.* Barlow, 4 C. B. N. S. 334, to find for the defendant, notwithstanding his burning the bricks had interfered with the plaintiff's comfort, if they were of opinion that the spot where the bricks were burnt was a proper and convenient spot, and the burning of them was, under the circumstances, a reasonable use by the defendant of his own land. The jury, consequently, if they were of that opinion, would have been bound to find their verdict for the defendant, notwithstanding they were also of opinion that the brick-kilns of the defendant, by immitting corrupted air upon the plaintiff's house, had rendered it unfit for healthy or comfortable occupation.

It was therefore treated as a doctrine of law that if the

spot should be found by the jury to be proper or convenient, and the burning of the bricks a reasonable use of the land, these circumstances would constitute a bar to the action; and if there is, in truth, no such doctrine, there was a misdirection — it is the same thing as if there had been a plea averring the existence of these circumstances, and a demurrer to the plea. Such a plea, though it would admit all the allegations in the declaration, would be a good plea by way of avoidance, if the direction of the Chief Justice was right. And it is not material to inquire whether it would be good as averring facts which amount to a legalization of the nuisance stated in the declaration, or as superadding facts which, taken together with those stated in the declaration, show that the alleged annoyance was not an actionable nuisance. In either point of view the question for our consideration appears to be, whether the case of Hole *v.* Barlow, 4 C. B. N. S. 334, was well decided. And we are of opinion that it was not.

That decision was plainly founded on a passage in Comyns' Digest, *Action upon the Case for a Nuisance* (C), which is in the following words: "So an action does not lie for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, etc., use his trade in a convenient place, though it be to the annoyance of his neighbor." It may be observed that in the language of this *dictum* (for which no authority is cited by Comyns) there is a want of precision, especially in the words "reasonable" and "convenient," which renders its meaning by no means clear. And it may be doubted whether the court, in Hole *v.* Barlow, did not misunderstand it. What is a "convenient place"? Does this expression mean, as the court understood it in that case, that the place is proper and convenient for the purpose of carrying on the trade, or does it mean that it is a place where a nuisance will not be caused to another? It has been pointed out by Mr. W. H. Willes, in his valuable edition of Gale on Easements, p. 410, note, that this latter

sense of the word "convenient" is the one adopted by Hide, C. J., in Jones *v.* Powell, Palm. 536, 539, s. c. Hutt. 135, where he says, "A tan-house is necessary, for all men wear shoes, and nevertheless it may be pulled down if it be erected to the nuisance of another: in like manner of a glass-house; and they ought to be erected in places convenient for them." In the original Norman-French it is "Un tan-house est necessary, car touts wear shoes; et uncore ceo poit estre pull down, &c., si est erect al nusance d'auter: et issint de glass-house; et pur ceux doient estre erect in places convenient pur eux." The term appears to be used in the same sense when applied to questions as to public nuisances. Thus it is said in Hawkins, P. C., book 1, c. 75, 2 Hawk. P. C., by Leach, p. 146, s. 10, "It seems to be agreed that a brew-house, erected in such an inconvenient place wherein the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance." It should seem, therefore, that just as the use of an offensive trade will be indictable as a public nuisance if it be carried on in an inconvenient place, — i. e., a place where it greatly incommodes a multitude of persons, — so it will be actionable as a private nuisance if it be carried on in an inconvenient place, — i. e., a place where it greatly incommodes an individual.

If this be the true construction of the expression "convenient" in the passage from Comyns' Digest, the doctrine contained in it amounts to no more than what has long been settled law, — namely, that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher or brewer and the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighboring house.

In Hole *v.* Barlow, 4 C. B. N. S. 334, however, the court

appear to have read the passage as containing a doctrine that a place may be "proper and convenient" for the carrying on of a trade, notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbor. This is a doctrine which has certainly never been judicially adopted in any case before that of Hole *v.* Barlow, and moreover the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar during the argument, and more especially with the case of Walter *v.* Selfe, 4 De Gex & Sm. 315.[1] And the introduction of such a doctrine into our law would, we think, lead to great inconvenience and hardship, because, as was forcibly urged by Mr. Mellish in arguing for the plaintiff, if the doctrine is to be maintained at all, it must be maintained to the extent that however ruinous may be the amount of nuisance caused to a neighbor's property by carrying on an offensive trade, he is without redress if a jury shall deem it right to find that the place where the trade is carried on is a proper and convenient place for the purpose.

It should be observed that the direction of the judge to the jury in Hole *v.* Barlow, 4 C. B. N. S. 334, which was upheld by the Court of Common Pleas, was simply that the verdict ought to be for the defendant if the place where the bricks were burnt was a convenient and proper place for the purpose. But in the present case the Lord Chief Justice's direction to the jury pointed at a further condition, — namely, if the burning of the bricks was under the circumstances a reasonable use by the defendant of his own land. It remains, therefore, to consider whether the doctrine adopted in Hole *v.* Barlow, if accompanied with this addition, is maintainable.

If it be good law that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land. But if it is not

[1] Affirmed on appeal, see 4 De G. & Sm. 326. —Reporter.

good law, and if the true doctrine is, that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be, then surely the jury cannot properly be asked whether the causing of the nuisance was a reasonable use of the land.

If such a question is proper for their consideration in an action such as the present, for a nuisance by immitting corrupted air into the plaintiff's house, we can see no reason why a similar question should not be submitted to the jury in actions for other violations of the ordinary rights of property; e. g., the transmission by a neighbor of water in a polluted condition. But certainly it would be difficult to maintain, as the law now stands, that the jury in such an action ought to be told to find for the defendant if they thought that the manufactory which caused the impurity of the water was built on a proper and convenient spot, and that the working of it was a reasonable use by the defendant of his own land. Again, where an easement has been gained in addition to the ordinary rights of property, — e. g., where a right has been gained to the lateral passage of light and air, — no one has ever suggested that the jury might be told, in an action for obstructing the free passage of the light and air, to find for the defendant if they were of opinion that the building which caused the obstruction was erected in a proper and convenient place, and in the reasonable enjoyment by the defendant of his own land. And yet, on principle, it is difficult to see why such a question should not be left to the jury if Hole *v.* Barlow was well decided.

We are, however, of opinion that the decision in that case was wrong, and, consequently, the direction of the Lord Chief Justice, which was founded on it, was erroneous, that the verdict for the defendant ought to be set aside and a verdict entered for the plaintiff.

POLLOCK, C. B. The question in this case is whether the direction of the Lord Chief Justice, professing to be founded on the decision of the Court of Common Pleas in Hole *v.* Barlow, 4 C. B. N. S. 334, was right, and in my judgment substantially it was right, viz., taking it to have been as stated in the case, viz., "that if the jury thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict." I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances, — the place where, the time when, the alleged nuisance, what, the mode of committing it, how, and the duration of it, whether temporary or permanent, occasional or continual, — as to make it impossible to lay down any rule of law applicable to every case, and which will also be useful in assisting a jury to come to a satisfactory conclusion: — it must at all times be a question of fact with reference to all the circumstances of the case.

Most certainly in my judgment it cannot be laid down as a legal proposition or doctrine that anything which under any circumstances lessens the comfort or endangers the health or safety of a neighbor, must necessarily be an actionable nuisance. That may be a nuisance in Grosvenor Square which would be none in Smithfield Market; that may be a nuisance at midday which would not be so at midnight; that may be a nuisance which is permanent and continual which would be no nuisance if temporary or occasional only. A clock striking the hour, or a bell ringing for some domestic purpose, may be a nuisance if unreasonably loud and discordant, of which the jury alone must judge; but although not unreasonably loud, if the owner, from some whim or caprice, made the clock strike the hour every ten minutes, or the bell ring continually, I think a

jury would be justified in considering it to be a very great nuisance. In general, a kitchen chimney suitable to the establishment to which it belonged, could not be deemed a nuisance, but if built in an inconvenient place or manner, on purpose to annoy the neighbors, it might, I think, very properly be treated as one. The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some enjoyment abridged to provide for the more general convenience or necessities of the whole community; and I think the more the details of the question are examined, the more clearly it will appear that all that the law can do is to lay down some general and vague proposition which will be no guide to the jury in each particular case that may come before them.

I am of opinion that the passage in Comyns' Digest, *Action upon the Case for a Nuisance* (C), is good law. I think the word "reasonable" cannot be an improper word, and too vague to be used on this occasion, seeing that the question whether a contract has been reasonably performed with reference to time, place, and subject-matter, is one that is put to a jury almost as often as a jury is assembled. If the act complained of be done in a convenient manner, so as to give no unnecessary annoyance, and be a reasonable exercise of some apparent right, or a reasonable use of the land, house, or property of the party under all the circumstances, in which I include the degree of inconvenience it will produce, then I think no action can be sustained, if the jury find that it was reasonable, — as the jury must be taken to have found that it was reasonable that the defendant should be allowed to do what he did, and reasonable that the plaintiff should submit to the inconvenience occasioned by what was done. And this gets rid of the difficulty suggested in the judgment just read by my brother Williams; because it cannot be supposed that a jury would find that to be a reasonable act by a person which produces any ruinous effect upon his neighbors.

With respect to the proposed judgment of the court, as the case does not state that leave was given by the consent of the defendant's counsel, or indeed at all, to enter a verdict for the plaintiff for 40*s.* damages, it appears to me that all that this court of error can do, if it disapproves of the direction of the Lord Chief Justice, is to award a *venire de novo* that the jury may find a verdict under proper direction; for there is strong ground for contending that the entire plot of ground, of which the plaintiff's and the defendant's land formed a part, was sold in various lots, on the understanding that the brick earth should be made into bricks and burnt, in order to erect houses on the defendant's lots, and it would seem not perfectly just that the purchaser of one of the lots should actually turn his brick earth into bricks and build a house, and then deny the same advantage to his neighbors. I think, therefore, that if my learned brothers are right in denying to the jury the power of finding that any act was an act reasonable to be done, still, on the statement of the present case, the court has not power to enter a verdict for the plaintiff for 40*s.*

But in my opinion the judgment of the court below ought to be affirmed.

MARTIN, B., read the judgment of

BRAMWELL, B. I am of opinion that this judgment should be reversed. The defendant has done that which, if done wantonly or maliciously, would be actionable as being a nuisance to the plaintiff's habitation by causing a sensible diminution of the comfortable enjoyment of it. This, therefore, calls on the defendant to justify or excuse what he has done. And his justification is this: He says that the nuisance is not to the health of the inhabitants of the plaintiff's house, that it is of a temporary character and is necessary for the beneficial use of his, the defendant's, land, and that the public good requires he should be entitled to do what he claims to do.

The question seems to me to be, Is this a justification in

law? and, in order not to make a verbal mistake, I will say, a justification for what is done, or a matter which makes what is done no nuisance? It is to be borne in mind, however, that, in *fact*, the act of the defendant is a nuisance such that it would be actionable if done wantonly or maliciously. The plaintiff, then, has a *prima facie* case. The defendant has infringed the maxim *Sic utere tuo ut alienum non lædas*. Then, what principle or rule of law can he rely on to defend himself? It is clear to my mind that there is some exception to the general application of the maxim mentioned. The instances put during the argument, of burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are; and it cannot be doubted that if a person maliciously and without cause made close to a dwelling-house the same offensive smells as may be made in emptying a cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is; for that is to suppose they violate their duty, and that if they discharged their duty, such matters would be actionable, which I think they could not and ought not to be. There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, — viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner — not unnatural nor unusual, but not the common and ordinary

use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbor's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.

Then can this principle be extended to, or is there any other principle which will comprehend, the present case? I know of none; it is for the defendant to show it. None of the above reasoning is applicable to such a cause of nuisance as the present. It had occurred to me that any not unnatural use of the land, if of a temporary character, might be justified; but I cannot see why its being of a temporary nature should warrant it. What is temporary, — one, five, or twenty years? If twenty, it would be difficult to say that a brick-kiln in the direction of the prevalent wind for twenty years would not be as objectionable as a permanent one in the opposite direction. If temporary in order to build a house on the land, why not temporary in order to exhaust the brick earth? I cannot think, then, that the nuisance being temporary makes a difference.

But it is said that, temporary or permanent, it is lawful because it is for the public benefit. Now, in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But further, with great respect, I think this consideration misapplied in this and many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all; so that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case, — whenever a thing is for the public benefit, properly understood, — the loss

to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that trains should run, but not unless they pay their expenses. If one of those expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit they should if the wood is not their own. If, though the wood were their own, they still would find it *compensated them* to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains. So in like way in this case a money value indeed cannot easily be put on the plaintiff's loss, but it is equal to some number of pounds or pence, £10, £50, or what not: unless the defendant's profits are enough to compensate this, I deny that it is for the public benefit he should do what he has done; if they are, he ought to compensate.

The only objection I can see to this reasoning is, that by injunction or by abatement of the nuisance a man who would not accept a pecuniary compensation might put a stop to works of great value, and much more than enough to compensate him. This objection, however, is comparatively of small practical importance; it may be that the law ought to be amended, and some means be provided to legalize such cases, as I believe is the case in some foreign countries on giving compensation; but I am clearly of opinion that, though the present law may be defective, it would be much worse, and be unjust and inexpedient, if it permitted such power of inflicting loss and damage to individuals without compensation, as is claimed by the argument for the defendant.

Since the decision of Hole *v.* Barlow, 4 C. B. N. S. 334, claims have been made to poison and foul rivers and to burn up and devastate land on the ground of public benefit. I am aware that case did not decide so much, but I have a difficulty, for the reasons I have mentioned, in saying that what has been so contended for does not follow from the principles enunciated in that case.

If we look to analogous cases, I find nothing to countenance the defendant's contention. A riparian owner cannot take water for the public benefit; he cannot foul it for the public benefit if to the prejudice of another owner. A common cannot be enclosed on such principle. A window, the fee-simple of which is 5*s*., cannot be stopped up by a building worth £1,000,000, of the greatest public benefit, nor a way. The windows of such a house might be blocked from light and air, however contrary that might be to the public benefit.

It is true that a man's character may be unjustly attacked in some cases without remedy. But we ought to follow the rule, not the exception; and that that is an exception and anomalous cannot be doubted. It is shown by such instances as I have put, and by this: if a man sees another apparently committing a felony, he is bound by law to prevent it if the man is really committing it; but if it turns out that no felony is being committed, the arrest of such a man would be an assault and false imprisonment.

As to the somewhat remote illustration of taking a man's land in case of foreign invasion, it is said that is a case of "necessity;" but it can hardly be a "necessity" to burn bricks on the defendant's land, to the nuisance of the plaintiff, without compensation.

I confess, then, I can see no reason or principle in the defendant's contention.

With the greatest respect for those who decided Hole *v.* Barlow, I cannot, for the reasons I have given, agree with it. That case reminds me strongly of what the late Lord Denman said, that he suspected a case very much when he

found it continually quoted immediately after its decision; and certainly Hole *v.* Barlow has been so quoted, and defences made on its authority which never would have been thought of before it appeared. It stands alone. It is practically opposed to cases of daily occurrence, where such a point might have been made and was not. I have a difficulty in putting a meaning on the words "convenient, reasonable, and proper," as there used. "Convenient, reasonable, and proper" as regards the sufferer? No. "Convenient, reasonable, and proper" as regards the defendant? That cannot be, as that might place the nuisance close to the plaintiff, to the entire loss of the power of dwelling in his house. "Convenient, reasonable, and proper" as between the two? Then the nuisance may lawfully be greater, as the defendant's premises are smaller, and so his kiln *must* be nearer. "Convenient, reasonable, and proper" as regards the public good? That I have already dealt with. These words are perfectly intelligible when applied to such nuisances as would form the common and ordinary use of land, etc. See the comments on the case by Mr. W. H. Willes, in his edition of Gale on Easements, p. 409, note. It is countenanced by the passage from Comyns' Digest tit. *Action upon the Case for a Nuisance* (C), alone, which is contradicted in the same book and is sufficiently dealt with by the judgment of my brother Williams.

In the result, then, I think it should be overruled, which practically is the question here; and that our judgment should be for the plaintiff.

Judgment reversed,[1] *and entered for the plaintiff for* 40*s.*[2]

[1] See St. Helen's Smelting Co. *v.* Tapping, 11 H. L. Cas. 642 (1865); Wier's Appeal, 74 Pa. 230 (1873); Campbell *v.* Seaman, 63 N. Y. 568 (1876); Appeal of Pennsylvania Lead Co., 96 Pa. 116 (1880); Demarest *v* Hardham, 34 N. J. Eq 469 (1881); Pennoyer *v.* Allen, 56 Wis. 502 (1883); Bohan *v.* Port Jervis Gas Light Co., 122 N. Y. 18 (1890); Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268 (1890); Shepard *v.* Hill, 151 Mass. 540 (1890).

[2] The parties afterwards agreed to enter a *stet processus.*

ROGERS *v.* ELLIOTT.

Supreme Judicial Court of Massachusetts, 1888.

[*Reported in* 146 *Mass.* 349.]

TORT for a nuisance, namely, the ringing of a church bell. At the trial in the Superior Court, before Staples, J., there was evidence tending to prove that the plaintiff, who lived with his father in a thickly settled portion of Provincetown, had received a sun-stroke, and was carried home and a physician called to attend him; that directly opposite his father's house across a street but twenty feet in width was a Roman Catholic church, of which the defendant was the clergyman in charge; that one of the incidents of the plaintiff's illness was that loud noises might throw him into convulsions; that the defendant was informed by the physician and the plaintiff's father of the probable consequences to the plaintiff of the ringing the bell upon his church, and was requested not to ring it; that the defendant refused to refrain from ringing the bell, but caused it to be rung eight times upon the next Sunday, as usual, twice before each of the four services held upon that day; that the plaintiff, the windows of whose room were shut, was thrown into violent and painful convulsions at each time that the bell on the church was rung, as well as when other bells in the town were rung, or a whistle on a steamboat in the harbor was blown, and once when the town clock struck; and that the convulsions increased the illness and retarded the recovery of the plaintiff.

The judge ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant; and reported the case for the determination of this court. If the ruling was wrong, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered on the verdict.

H. M. Knowlton, for the plaintiff, stated in his brief, that "the plaintiff does not rely upon any evidence of express malice on the part of the defendant. But he claims that, under all the circumstances of the case, the law would imply malice on his part."

J. J. McDonough, for the defendant.

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic church used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street in a thickly settled part of the town; and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. Wesson *v.* Washburn Iron Co., 13 Allen, 95.

In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. In densely populated communities the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objection-

able solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house, — not how it will affect a particular person, who happens to be there to-day, or who may chance to come to-morrow. Fay *v.* Whitman, 100 Mass. 76; Davis *v.* Sawyer, 133 Mass. 289; Walter *v.* Selfe, 4 DeG. & Sm. 315, 323; Soltau *v.* De Held, 2 Sim. (N. S.) 133; St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642.

In Walter *v.* Selfe, Vice-Chancellor Knight Bruce, after elaborating his statement of the rule, concludes as follows: "They have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house,

whatever their rank or station, whatever their age, or whatever their state of health."

It is said by Lord Romilly, Master of the Rolls, in Crump *v.* Lambert, L. R. 3 Eq. 409, that "the real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence."

In the opinion in Sparhawk *v.* Union Passenger Railway, 54 Penn. St. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injury from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence."

In the case of Westcott *v.* Middleton, 16 Stew. (N. J.) 478, it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible and other work was going on, which affected the tender sensibilities of the plaintiff, and caused him great discomfort. Vice-Chancellor Bird, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor, because he is so morally or mentally constituted that the particular business complained of is an offence or a nuisance to him, or destructive to his comfort or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining. . . . A wide range has indeed been given to courts of equity in dealing with these matters; but I can find no case where the court has extended aid unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike."

If one's right to use his property were to depend upon

the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used.

The plaintiff, in his brief, concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise

of his legal rights. How far and under what circumstances malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.[1]

NATHANIEL A. FISHER AND OTHERS, TRUSTEES, *v.* JOSEPH A. BUDLONG.

Supreme Court of Rhode Island, 1873.

[*Reported in* 10 *R. I.* 525.]

ACTION of the case for deceit in inducing the plaintiffs to sell their stock in the Commercial Insurance Company for less than its real value. The facts of the case, which were submitted to the court both in fact and law, a jury trial having been waived, are stated in the opinion of the court.

B. N. Lapham, for the plaintiffs, cited Smith *v.* Countryman, 30 N. Y. 655; Kerr on Fraud & Mistake, pp. 31, 84, 87, 94, 143, 150, 385, 386.

Hart & Stiness, for defendant, cited Irvine *v.* Kirkpatrick, 3 Eng. L. & E. 17 (note); Laidlaw et al. *v.* Organ, 2 Wheat. 178; Kintzing *v.* McElrath, 5 Pa. State, 467; Shrewsbury *v.* Blount et al., 2 Scott N. S. 588; Setzar *v.* Wilson et al., 4 Ired. 501; Vernon *v.* Keys, 12 East, 632; Farnam *v.* Brooks, 9 Pick. 213; Wason *v.* Wareing, 15 Eng. L. & E. 121; 2 Pars. on Cont. p. 275, (4th ed.); Hammett *v.* Emerson, 27 Maine, 308; Sanford *v.* Handy, 23 Wend. 260.

POTTER, J. This is an action for deceit in inducing the plaintiffs to sell certain insurance stocks for less than their fair value. A jury trial was waived and the case was heard by the full court October 7, 1873. The declaration alleged that the defendant was president of the Commercial

[1] Compare Price *v.* Grantz, 118 Pa. 402 (1888).

Insurance Company, and said plaintiffs were owners of certain shares in said company's stock; and that defendant, intending to deceive and induce the plaintiffs to sell for less than the value thereof, falsely represented to the plaintiffs that said company had met with losses, was not doing a good business, and that the plaintiffs could expect no dividends for a long time, and that the stock was worth no more than thirty-five dollars per share; that if they wanted an income they had better sell and reinvest, but that he would inquire, &c.; and in a short time defendant reported that he had an offer of forty-eight dollars, which was a very good offer, all which representations were false; but plaintiffs, relying on them as true, sold, as they were informed by defendant, to one L. W. Anthony; but that said sale was really made for the defendant himself; that said stock was then worth more, namely, one hundred dollars per share, and known to the defendant to be so. And so the defendant deceived and defrauded the plaintiffs.

The plaintiffs owned in November, 1867, certain shares in the stock of an insurance company (par value fifty dollars), of which the defendant was president. The plaintiff, Fisher, testified that he had bought some shares and paid fifty-four dollars; the defendant meeting him, and being told of it, said he was sorry, as it had been offered to him (defendant) for less, and he could have bought it for less. The plaintiff replied he had inquired of the secretary, who told him it was worth fifty-five dollars. The defendant said the secretary knew more about books than about insurance business. The defendant, on being asked what it was worth, said probably thirty-five dollars; they had not done a good business, had unadjusted losses, and could not pay a dividend; that the value would depend on the unadjusted claims; and advised him to sell, and said he might hear of some one who would buy. A few days after he said he had not heard of any one. Soon after defendant told the plaintiff he, defendant, thought he knew of one; and the next time they met defendant

said he had an advantageous offer, a good offer, — forty-eight dollars. The plaintiff told defendant he confided in him, and should do it on his representations. They went to the transfer book and it was transferred to L. W. Anthony. Defendant paid with his own check. The defendant asked, and after some objection the plaintiff paid him, a commission for selling it for him. The shares were afterwards transferred into the name of the defendant, and the plaintiff says the defendant afterwards told him he bought for himself.

The defendant testified that he told the plaintiff the stock had been offered to him for less; that they had unadjusted losses; and that on a calculation made on what he considered a right basis, it was worth about thirty-five dollars; that they had heard of several losses lately; that he told him he could not buy his shares without assistance; he had a man in his mind, and the next time he met plaintiff he told him he had seen Anthony and had a good offer, — forty-eight dollars; that Anthony furnished a part of the purchase money. The fact that a commission was demanded and paid was not denied.

The defendant also testified that he bought at different times two or three hundred shares to get control of the company and to change its management; that the chance of buying the Fisher stock first suggested this to him and explained his objects in not having this and other stock purchased by him transferred to his own name.

Evidence was put in as to other purchases by the defendant, two of which were made by him in the name of a third person, and a commission charged. The plaintiff denied the defendant's version of the conversation as to the basis on which he calculated the value; and said that the defendant did not say that he wanted the stock for a particular purpose, and that he could get some one to assist him in it; and testified that he never suspected that the defendant was buying for himself.

In February, 1869, the company voted to wind up, and

after paying out eighty dollars and sixty cents per share, the defendant bought out the rest at nine dollars per share. Of this latter amount he said he lost a portion in settling.

In the case of an ordinary sale of goods it is now well settled that where there is no fraudulent representation and no special confidence reposed, the vendor is not obliged to disclose all the circumstances within his knowledge which might affect the value of the thing sold. The greater part of the cases in the books are where it is claimed that there has been some fraud on the part of the seller; but there is no reason why the same principle should not apply as well to the case of a person endeavoring to purchase an article. And we find it has been so applied. See cases in Benjamin on Sales (2d ed.), 355; Kitzing et al. *v.* McElrath et al., 5 Pa. State, 467; Smith *v.* Countryman, 30 N. Y. (3 Tiffany) 655, 670, 681. The decision in Laidlaw *v.* Organ, 2 Wheat. 178, 195, where there was concealment of knowledge by a vendee, gave rise to a great deal of discussion when made, but has for a long time been considered as settled. See Verplanck on Contracts, and the articles in the North American Review and American Jurist and the law magazines, to which it gave rise; 2 Kent's Com. (11th ed.) *482, criticised in Benjamin on Sales (2d ed.), 355. And while, in the language of Lord Ellenborough, a buyer should not be liable to a suit for deceit for misrepresenting a seller's chance of selling for a good price, where the buyer is under no legal pledge or obligation to the seller for the accuracy of his statement, Vernon *v.* Keys, 12 East, 632, 638, yet if there be any peculiar relation implying confidence or leading to confidence, it would take the case out of the ordinary rule. In the present case there are peculiar circumstances. The plaintiff was a stockholder in, and the defendant president of, an insurance company. Now, if the defendant had gone to the plaintiff, and without any special representations made an offer of a certain sum, and the plaintiff had accepted, he could have had no

right to complain. As a matter of common sense, the fact that the president of the company, presumed to be fully acquainted with its condition, offered a certain sum, would put the seller on his guard, and he might in most cases reasonably consider that he might get more. The defendant's counsel supposes a case of a buyer of a horse, suggesting to the seller that the horse had the glanders, and inquires if, in case he obtained the horse for a less price on that account, he would be liable in deceit. But to make the case resemble the present, we must add the circumstances that the buyer was a horse doctor, and professed not to be buying for himself, but offered as a friend to aid the seller in selling to some one else for a good price. The material point in the present case, and which we consider to be fully proved, is, that the defendant professed to be aiding the plaintiff in selling his stock and getting a good price for it. He offers to procure him a purchaser, and after a while informs him he has done so; and upon his advice the sale is made and the stock transferred to the supposed purchaser, who afterwards transferred to the defendant, and the defendant demanded, and the seller paid, a commission for his services in the sale. The seller has no suspicion that he is actually selling to the defendant, but is led to suppose that the defendant is acting as his friend, or in fact his agent, to advise and assist him in the sale. Thus the seller was led to repose a trust and confidence in the defendant. And apart from this the plaintiff had a right to suppose that the defendant, as president of the company, knew its situation, and that he could rely upon his statements as to value; as a stockholder, he had in fact a legal right to call upon him for information, and the defendant must have known that, from his understood relation to the business, his statement would be so relied on.

In some of the statements made by the defendant there was more or less truth; that the company had met with losses, etc., etc.; but when the defendant proceeds to fix

a value on the stock and advise a sale, his opinion carries weight from his known position and opportunities of knowledge, and more especially when he is supposed to be acting disinterestedly, and as a friend.

Officers of corporations have in many cases been held to sustain a relation of trust to their stockholders, and although any single officer cannot perhaps be considered as standing in the relation of trustee to each stockholder, yet even in such a case it would be considered as a reason for confidence, and more especially when this officer is practically the sole manager of the corporation, and the stockholder has a right to call on him for this very information. Much evidence was offered as to the condition of the company, and the market price of its stock at various times. The defendant contended that his mode of stating its affairs was the safe and conservative one, while it was contended on the other side that the defendant's representations had been the means of keeping down the market value of the stock; and several witnesses testified that the mode of valuation as proposed by the secretary was the common and usual one. We do not deem it necessary to recapitulate it.

We enter judgment for the plaintiffs for $1,989 and costs, being seventeen dollars for each share of the stock purchased of them by the defendant.

RICHARDSON v. SILVESTER.

Queen's Bench, 1873.

[*Reported in L. R. 9 Q. B. 34.*]

APPEAL from the County Court of Montgomeryshire, held at Machynlleth.

This was an action of tort, and the particulars of the plaintiff's claim were as follows: — The plaintiff sues the defendant in tort for legal fraud and deceit, committed

under the following circumstances: for that the defendant, in or about March, 1872, caused to be inserted in a public newspaper, called the *Cambrian News*, an advertisement for the letting by tender, with immediate possession, of all that farm, mansion house and mill, called Dolangwyn, situate in the parish of Fowyn, in the county of Merioneth, containing 400 acres (more or less), together with an extensive sheepwalk or mountain pasture carrying 1000 sheep. And the plaintiff, believing in the *bona fides* of such advertisement and desiring to become tenant of a place of the description advertised, was induced to take and did take considerable trouble and pains, and incurred considerable costs and expenses in going to and inspecting the property, and in the employment of persons to inspect and value it for him with a view to his becoming tenant thereof, whereas it afterwards appeared that the defendant had no power to let the property as advertised, and caused the advertisement to be issued to serve some purpose of his own, other than that appearing by the advertisement. And the plaintiff claims for damages £50.

The action came on for trial on the 27th of February, 1873. Neither party demanded a jury.

The plaintiff applied to have the particulars amended by inserting the words, "The defendant knew, at the time he caused such advertisement to be published, that he had not power to let the said farm, and the said farm was not to be let."

The Judge was of opinion that the particulars filed did not disclose, and if amended in the manner required by the plaintiff would not disclose, a good cause of action, and directed that the plaintiff should be nonsuited.

The question for the opinion of the court was, whether the particulars filed disclose, or whether, if amended in the manner required by the plaintiff, they would disclose a good cause of action.

Lopes, Q. C., for the plaintiff. The particulars disclose a cause of action. The action is brought for legal fraud

and deceit. The particulars with the amendment show that the defendant has stated as a matter of fact that which is untrue, knowing it to be untrue, intending that the plaintiff, as one of the public, should act upon it, and he, having acted upon it, has sustained damage. There are, therefore, both a wrong and a loss, for which an action lies: Gerhard *v.* Bates, 2 E. & B. 476; 22 L. J. (Q. B.) 364. Even without the amendment the concluding sentence of the particulars shows *mala fides* in the defendant sufficient to sustain the action. The judge was wrong in nonsuiting the plaintiff; he ought to have heard the evidence.

Pritchard, for the defendant. The particulars, either with or without the proposed amendment, show no cause of action. The particulars do not allege that the advertisement was fraudulently inserted with intent to injure the plaintiff. It is a mere declaration of the defendant's intention to sell the property, for which no action lies. Harris *v.* Nickerson, Law Rep. 8 Q. B. 286.

Lopes, Q. C., was not heard in reply.

BLACKBURN, J. I think the judge was wrong in nonsuiting the plaintiff. The question is not whether there was sufficient evidence to support an action for a false representation, — that would appear when the evidence was heard, — but whether, upon the allegations contained in the particulars, there was a cause of action. If the particulars disclose no cause of action, or it appears, from the opening statement of the plaintiff's advocate, that there was no cause of action, no judge would be bound to hear the facts proved, and he would in such case act rightly in nonsuiting the plaintiff; but if what is assigned as a cause of action might be a cause of action, then the judge ought to hear the evidence and see if the cause of action can be proved. I think, in the present case, on the face of the particulars especially when amended as proposed, a cause of action was disclosed. It must be taken upon the statement of the plaintiff that the advertisement was issued with some in-

direct motive, and that the farm was not to be let. This amounts to a false representation. It was a false statement knowingly made and published in order to be read by persons who would be likely to be tenants of farms, and the natural consequence would be that a person who was desirous of becoming a tenant would, upon reading the advertisement, incur expense in looking at the farm. This, it is alleged, is what the plaintiff did. It must also be taken that this was a representation made to the plaintiff. In Swift *v.* Winterbotham, Law Rep. 8 Q. B. at p. 253, it is said, in the judgment of the Court, "It is now well established that, in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view of its being acted on, and the plaintiff, as one of the public, acts on it and suffers damage thereby." According to the law so laid down, the advertisement must be read as if the representation was made to the plaintiff. Then if there is a false representation knowingly made to the plaintiff, and he acts on it and is injured, he has a cause of action. That was decided in Gerhard *v.* Bates, 2 E. & B. 468; 22 L. J. (Q. B.) 364. The cases of Barley *v.* Walford, 9 Q. B. 197, and Evans *v.* Collins, 5 Q. B. 804, are also authorities to the same effect. In the last case the judgment of the Court of Queen's Bench was reversed, and the law was settled that a mere misrepresentation, untrue in fact, but honestly made, would give no cause of action. In the present case the allegation is, that it was a false representation to the knowledge of the party making it, and I think the judge was premature in directing a nonsuit.

QUAIN, J. I am of the same opinion. I think the case should go back to the county court judge to be heard upon its merits. I do not say for a moment that a county court

judge is not justified in strictness in taking the course which was taken in this case, namely, to nonsuit upon the opening; but that is a course which I venture to think, in a court where there are no written pleadings, should not be adopted, except in very plain cases, because, should he be wrong upon the opening, the result is that there will be two trials, when it might have been decided upon the real merits of the case once for all. I think the particulars disclose a cause of action, which ought to have been heard on the merits. They in effect allege that the plaintiff falsely, and well knowing he had no authority to sell the farm, represented that he had, and published an advertisement to that effect. It is quite clear that all persons who were likely to take a farm, or might be reasonably contemplating taking a farm, acting upon that advertisement, and incurring expense in consequence of that false representation, have a remedy by action for deceit. It appears to me that the particulars and the amendment do disclose a cause of action for deceit; and under such circumstances I think the judge ought to have heard the case, and the case should be sent back to him to be further heard.

ARCHIBALD, J., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *Jones, Blaxland & Son.*

Attorney for defendant: *J. Needham.*

THE INDIANAPOLIS, PERU, & CHICAGO RAILWAY COMPANY, *Respondents*, *v.* THOMAS M. TYNG, *Appellant.*

Court of Appeals of New York, 1876.

[*Reported in* 68 *N. Y.* 653.[1]]

THIS was an action for fraud. (Reported below, 2 Hun, 311.)

The first count in the complaint alleged, in substance,

[1] In the part entitled "Memoranda of causes decided during the period embraced in this volume and not reported in full."

that defendant presented to plaintiff's agent a description of two locomotives which he represented as for sale, and requested authority to purchase the same for defendant; that defendant falsely and fraudulently represented that $26,000 was the lowest price for which the owner would sell the same; that, relying on such representations, plaintiff's agent authorized the purchase thereof, and, upon defendant's report, that he had accepted the offer, paid to him the said sum of $26,000, with $500 for his commissions; that, in truth and in fact, the owners had agreed to sell said engines for $20,000, and that defendant paid for the same not exceeding that amount.

The second count alleged that defendant, with intent to cheat and defraud plaintiff, further falsely and fraudulently represented said engines to correspond with a description or specification thereof exhibited by him to plaintiff's agent, and that the said engines were good and serviceable, defendant well knowing the said representations to be false; that plaintiff's agent, believing said representations, agreed to purchase, upon receiving a warranty that the engines, in all respects, would answer and be equal to the specification; that defendant executed a bill of sale containing such warranty in his own name, without disclosing the vendor, and plaintiff's agent confiding in the specification, representation and warranty, received the bill of sale, and paid to defendant $26,500, by means whereof plaintiff was greatly damaged, etc.

The defendant claimed upon the trial that as to the second count the rights of the parties were fixed by the bill of sale, and as it contained an implied warranty of quality upon which plaintiff relied, as stated in said count, it did not set forth facts sufficient to constitute a cause of action for fraud. *Held*, that as the complaint alleged, and as the referee found upon sufficient evidence, that it was by means of the false representations, as well as of the warranty, that plaintiff was deceived and suffered damage, a good cause of action for fraud was set forth and maintained. Wardell *v.* Fosdick, 13 J. R. 325; Ward *v.* Wiman, 17 Wend. 193.

It appeared that plaintiff's agent advanced the money himself to make the purchase, and it did not appear that it had been repaid by plaintiff. Defendant knew of the agency. *Held*, that it was not material whether the money was repaid or not; plaintiff was the principal, and as such was liable to the agent for the money advanced, and all loss resulting from the purchase was its loss.

Also, *held*, that it mattered not that upon the face of the papers the agent appeared as principal; that as principal plaintiff could enforce the contracts of its agent, although upon the face of the papers the agent was the apparent party, and although in an action to charge him as principal he might be estopped from showing his agency. Evidence will be received to let in a party not apparent in the contract, but not to discharge one apparently a party. Sims *v.* Bond, 27 E. C. L. R. 97; Beebee *v.* Robert, 12 Wend. 413; Ford *v.* Williams, 21 How. U. S. 287; Wilson *v.* Hart, 7 Taunt. 295; Trueman *v.* Loder, 11 A. & E. 595; 39 E. C. L. R. 178.

According to the plaintiff's evidence on the trial, defendant, among other representations, represented to plaintiff's agent that one Bissel, known to said agent as an expert, had examined the engines carefully, and was a reliable man; he referred the agent to Bissel to ascertain the qualities of the engines, and sent Bissel to the agent. Bissel, in substance, stated that he had examined the engines, and that they conformed to the specification, and were good, serviceable engines. It appeared that in fact Bissel had never made any such examination, and that the engines were in a bad condition and unfit for use. *Held*, that as defendant assumed to have knowledge of the fact of Bissel's examination, which was a material fact, when in truth he had no such knowledge, if the representation was made with intent to deceive, it was, in a legal sense, false and fraudulent. Bennett *v.* Judson, 21 N. Y. 238; Wakeman *v.* Dalley, 51 id. 27. Also, that defendant was bound by the representations of Bissel. Barwick *v.* Eng. Joint Bk., L. R. 2 Exch. 259; Hathaway *v.* Johnson, 55 N. Y. 93.

Plaintiff's counsel, after giving notice to defendant to produce the specification exhibited by defendant to plaintiff's agent, offered in evidence a paper, after proof that it was a substantial copy of the specification. This was denied by defendant, who produced a paper claimed by him to be the original. It appeared that the description in the alleged copy was almost identical with that contained in the bill of sale, while the paper produced by defendant differed therefrom. The referee admitted the alleged copy. *Held*, no error; that the question as to its being a copy was a collateral issue for the referee to decide, and that the presumption was that in the drawing the bill of sale the parties followed the paper on which the negotiations had been based.

The referee received evidence, under objection, from experts, of the condition and value of the engines after they reached Peru. It was proved that they were in the same condition when they reached Peru as they were when purchased at Lowell, Mass., except some mishaps to one of them, which was run while on the way, occasioned by the defects in it, and that they had not been misused. *Held*, that the evidence was competent.

The referee allowed as damages the $6,000 paid to defendant, more than the engines cost him, and the difference in value between the engines as they were and as represented. *Held*, no error.

T. Mitchell Tyng, appellant, in person.

Samuel Hand for the respondent.

FOLGER, J., reads for affirmance.

All concur; ALLEN, J., not sitting.

Judgment affirmed.

Judgment accordingly.[1]

[1] Compare Cowley *v.* Smyth, 46 N. J. L. 380 (1884); Derry *v.* Peek, 14 App. Cas. 337 (1889); Giddings *v.* Baker, 80 Tex. 308 (1891).

THE EATON, COLE & BURNHAM CO., Respondents, *v.* ROBERT AVERY, Appellant.

Court of Appeals of New York, 1880.

[*Reported in* 83 *N. Y.* 31.]

APPEAL from judgment of the general term of the Supreme Court in the Second Judicial Department, affirming a judgment in favor of plaintiff entered upon a verdict. The decision of the general term was made February 13, 1879. (Reported below, 18 Hun, 44).

The nature of the action and the facts are set forth sufficiently in the opinion.

John H. Bergen, for appellant. Plaintiff cannot recover where the facts and circumstances are such that they ought to have excited suspicion and led to inquiry. Williams *v.* Brown, 15 N. Y. 351; Heulich *v.* Brennan, 11 Hun, 194. Plaintiff could not maintain this action even if it had given credit, relying on the report. Cooley on Torts, pp. 476, 487, 493, 496; Long *v.* Warren, 68 N. Y. 426; Peck *v.* Gurney, 8 Moak's Eng. Rep. 1; Barry *v.* Croskey, 2 J. & H. 117, 118, 123; Langridge *v.* Levy, 4 M. & W. 337.

John L. Hill, for respondent. Defendant was properly held for fraud if he materially misrepresented the financial ability of his firm through the commercial agency, for the purpose of obtaining, and thereby actually obtained, the plaintiff's goods on credit. 25 Barb. 583; Cazeaux *v.* Mali, id. 578; 31 id. 129; Newbury *v.* Garland, id. 121; Bruff *v.* Mali, 36 N. Y. 200; Morgan *v.* Skiddy, 62 id. 319; Westcott *v.* Ainsworth, 9 Hun, 53.

RAPALLO, J. This is an action for deceit, in obtaining the sale and delivery of goods to the firm of Avery & Riggins, by means of false representations made by the defendant as to the pecuniary condition of his firm. The

representations charged were not made directly by the defendant to the plaintiff, but are alleged to have been made by him to a mercantile agency, Dun, Barlow & Co., or its agent, and by it communicated to the plaintiff, who claims that it delivered the goods to Avery & Riggins on credit, on the faith of such representations. The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned judge before whom the trial was had, in his charge to the jury, wherein he instructed them that if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Riggins, and they were false, and so known to be by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principle of adjudications in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof. Cazeaux *v.* Mali, 25 Barb. 278; Newbury *v.* Garland, 31 id. 121; Bruff *v.* Mali, 36 N. Y. 200; Morgan *v.* Skiddy, 62 id. 319; Commonwealth *v.* Call, 21 Pick. 515, 523; Commonwealth *v.* Harley, 7 Metc. 462. The principle of these cases is peculiarly applicable to the case of statements made to mercantile

agencies. Proof was given on the trial as to the business and office of these agencies, but they are so well known, and have been so often the subject of discussion in adjudicated cases, that the court can take judicial notice of them. Their business is to collect information as to the circumstances, standing, and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers to the agency, when applied to by a customer to sell goods to him on credit, may, by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means, and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a wilfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and, in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.

The counsel for the appellant is undoubtedly right in his general proposition that a false representation made to one person cannot give a right of action to another to whom it may be communicated, and who acts in reliance upon its truth. If A casually or from vanity makes a false or exaggerated statement of his pecuniary means to B, or even if he does so with intent to deceive and defraud B, and B communicates the statement to C, who acts upon it, A cannot be held as for a false representation to C. But if A makes the statement to B for the purpose of being

communicated to C, or intending that it shall reach and influence him, he can be so held. In Commonwealth *v.* Call, 21 Pick. 515, the court say on this point at page 523 that the representation was intended to reach P and operate upon his mind; that it did reach him and produced the desired effect upon him, and that it was immaterial whether it passed through a direct or circuitous channel.

In Commonwealth *v.* Harley, 7 Metc. 462, the prisoner was indicted for obtaining goods by false pretences from G. B. & Co. The representations were made by one Cameron, in the absence of the prisoner, Harley, to a clerk of G. B. & Co. who communicated them to a member of the firm. But there was evidence that they were made by Cameron with the approbation and direction of Harley, and these facts were held sufficient to sustain a conviction. Neither is it necessary that there should be an intent to defraud any particular person. Should A make a false statement of his affairs to B, and then publicly hold out B as his reference, can it be doubted that he would be bound by the communication of his statement by B to any person who might inquire of him in consequence of this reference? That case differs from the present one only in the fact that here there was no express invitation to the public to call upon Dun, Barlow & Co. for information. But the defendant knew that they were a mercantile agency whose business it was to give information as to the standing and means of dealers, and that it was resorted to by merchants to obtain such information. By making a statement of the financial condition of his firm to such an agency he virtually instructed it what to say if inquired of. Can it make any difference whether he spontaneously went to the agency to furnish the information, or whether he gave it on their application? He must have known that the object of the inquiry was not to satisfy mere curiosity, but to enable the agency to give information upon which persons applying for it might act, in dealing with the defendant's firm.

The case is a new one in its facts, but the principles by which it should be governed are well established.

The further question arises on this appeal, whether there was sufficient evidence to justify the submission of the case to the jury under the rule of law which has been stated, or whether the motion for a nonsuit should be granted. In considering this question we must lay out of view the evidence on the part of the defendant, which is contradictory of that on the part of the plaintiff, but which is largely relied upon in the statement of the case in the points of the appellant, and we must put the most favorable construction upon the plaintiff's evidence. The evidence on the part of the plaintiff is in substance as follows: An employee of Dun, Barlow & Co., a mercantile agency, testified that in August, 1875, he applied to the defendant for a statement of the means of defendant's firm, to be reported to Dun, Barlow & Co.; that he presented to defendant the card of Dun, Barlow & Co., and informed him of the object of his visit, and the defendant professed himself pleased to give all the information pertaining to his business which Dun, Barlow & Co. required; that he then stated that the capital of the firm was $20,000, chiefly furnished by himself, and that the capital so contributed by him was in money, and then went on to give further particulars. The employee reduced the statement to writing and afterward transcribed it in the books of Dun, Barlow & Co. Mr. Eaton, the president of the plaintiff, testified that in September, 1875, the defendant applied to him to sell to his firm some goods on a credit of thirty days; that before making the sale, and while the matter was under advisement, he (Eaton) sent to the office of Dun, Barlow & Co. for information as to the responsibility of Avery & Riggins, and they sent him an answer in writing, which, after he had examined it, he put in his record book. This paper the witness produced at the trial, and he testified that in the following February, after the defendant had failed to pay for the goods, he, the

witness, read to the defendant the identical report which he had received from Dun, Barlow & Co., as above stated, and asked him if it was correct, and the defendant replied that the agent of Dun, Barlow & Co. had called upon him, and that the statement of Dun, Barlow & Co. was as he had given it to the agent. This statement contained the following among other particulars: "A" (Avery) . . . . "claims to have $20,000 in the business, all his means, and furnished by him." Eaton testified that he received this statement or report about the 1st of September, and that the principal item of goods was sold on the 14th of September. He personally negotiated the sale. That the order was talked over some time previous to its being given, and during that time he got Dun, Barlow & Co.'s report. He also testified that he relied entirely upon that report; that after the sale and before the delivery of the goods, the treasurer of the company, Mr. Cole, demurred to the sale, fearing that Avery & Riggins were not responsible, but the witness produced Dun, Barlow & Co.'s report, and Cole admitted that under such a statement they could not consistently refuse them the credit.

This evidence is substantially corroborated by Mr. Cole. The sale and delivery of the goods was shown, and only a portion of the price was ever paid, and Avery & Riggins went into bankruptcy early in the following year.

Riggins, the partner of the defendant, testified that the defendant did not contribute any capital to the firm of Avery & Riggins, either in money or property; but he, the witness, contributed about $6,000 worth of tools, which, when Avery came with him, he rated at $4,000, of which Avery was to pay $2,000, but that he had not paid it, and the firm stopped business in February, 1876.

This witness further testified that in August, 1875, the defendant said to witness that he was going down to the commercial agency, and was there going to put this property in the name and to the credit of the concern; that he afterward came back and said he had rated the firm at $25,000.

There is much more evidence in the case. Most of the inculpatory statements contained in the testimony on the part of the plaintiff are denied by the defendant, and there are some discrepancies in the testimony on the part of the plaintiff. These were proper matters for the consideration of the jury, but they cannot affect the question of the propriety of granting the motion for a nonsuit. The evidence above quoted being in the case, it could not be withdrawn from the jury. The making of the representations, their falsity, and the defendant's knowledge of their falsity, and that the plaintiff relied upon them, were sufficiently proved, *prima facie*, if the plaintiff's witnesses were credited. It is also clear that the defendant, when making the statements, knew that they were to be used by a mercantile agency, and the testimony of Riggins, if credited, tends to show that the defendant understood the effect of the representations and desired to have a high rating, and also tends to establish a fraudulent intent. The jury might legitimately draw the inference that the alleged false statement of the capital of the concern was made for the purpose of giving it a credit to which it was not entitled, and of defrauding any person who might inquire of the agency or consult its lists. That he knew that these agencies issued such lists to merchants who paid for them, appears from his own testimony, and his denial of knowledge of the purposes for which they were issued and consulted was not conclusive. The jury was entitled to draw its own inferences on that subject from the circumstances, notwithstanding this denial.

For these reasons we think that the motion for a nonsuit was properly denied. There are numerous exceptions to rulings on questions of the admissibility of evidence, and we have examined them all; but, without going into detail, our conclusion is that no error was committed in this respect which would justify a reversal of the judgment. The most important exception in the case is to the refusal of the judge to charge as requested, "that the jury might

take into consideration whether the report made to the plaintiff by Dun, Barlow & Co., coupled with conditions and distrust in such a way as it was, was such a statement as a prudent man would rely on." The conditions and distrust here referred to are the statement contained in the report received by the plaintiff from Dun, Barlow & Co., following their account of what Avery had represented to them, as follows: "We do not confirm his possession of so much means as he claims, though he has had opportunities to earn it. Claims to have contract for $25,000 worth of work at profitable rates. Their claims for credit are not yet established, and for the present small amounts should rule, though so far have paid as agreed;" and appended to the report was a general caution in these words: "The information given on this sheet, in answer to your inquiry, is, you will remember, communicated in the strictest confidence, to be used as a private memorandum for your guidance in your own business, and not to be communicated to any other person or persons.

"The actual verity of this or any other information obtained through the mercantile agency is in no manner guaranteed by the said agency or the proprietors thereof, for, notwithstanding every effort, mistakes and misapprehensions may occasionally occur."

These cautions related rather to the responsibility of Dun, Barlow & Co., for the accuracy of the information which they communicated, than to that of the defendant for the truthfulness of that which he lodged with them for the purposes of their agency. Still, we think that the defendant was entitled to have the jury instructed in some form, that they might take into consideration whether the report, such as it was, was calculated to mislead a prudent man. If a refusal so to charge had stood uncorrected, a serious question would have been presented. The judge, in refusing the request, expressed his own opinion that the plaintiff had the right to rely upon the statement, but immediately afterward, on the concession of the plaintiff's

counsel, the judge modified his refusal and charge, and submitted the question to the jury in such an unequivocal and clear manner that they could not have misapprehended it. He charged them that if they found upon all the evidence in the case that the statement that came to the plaintiff was not a statement that was likely to deceive a prudent person, they should find for the defendant. The form of the request which was refused, if the case stood upon that, would be subject to criticism, and we think that the charge as made gave the defendant the full benefit of the point at which he was aiming.

The other exceptions have already been sufficiently covered; we find none which in our judgment should be sustained.

The judgment should be affirmed.

All concur.

Judgment affirmed.[1]

DIXON *v.* BELL.

King's Bench, 1816.

(*Reported in* 5 *M. & S.* 198.)

CASE. The plaintiff declares that the defendant was possessed of a gun, then being in a certain messuage, situate, etc.; and that he, well knowing the same to be loaded with powder and printing types, wrongfully and injuriously sent a female servant to the said messuage, to fetch away the gun so loaded, he well knowing that the said servant was too young, and an unfit and improper person to be sent for the gun, and to be intrusted with the care or custody of it; and which said servant afterwards, and while she was so sent and intrusted by the defendant, and had the custody of the said gun accordingly, carelessly and improperly shot off the same, at and into the face of the

[1] See Gainesville National Bank *v.* Bamberger, 77 Tex. 48 (1890).

plaintiff's son and servant, and struck out his right eye and two of his teeth, whereby he became sick, etc.; and was prevented from performing his lawful business, and the plaintiff was deprived of his service, and put to great expense in procuring his cure, etc. There was a second count, for taking such improper care of the gun, knowing that it was loaded, that the gun was afterwards discharged against the plaintiff's son, etc. Plea, not guilty. At the trial, before Lord Ellenborough, C. J., at the last Middlesex sittings, the case was thus: —

The plaintiff and defendant both lodged at the house of one Leman, where the defendant kept a gun loaded with types, in consequence of several robberies having been committed in the neighborhood. The defendant left the house on the 10th of October, and sent a mulatto girl, his servant, of the age of about thirteen or fourteen, for the gun, desiring Leman to give it her, and to take the priming out. Leman accordingly took out the priming, told the girl so, and delivered the gun to her. She put it down in the kitchen, resting on the butt, and, soon afterwards took it up again, and presented it, in play, at the plaintiff's son, a child between eight and nine, saying she would shoot him, and drew the trigger. The gun went off, and the consequences stated in the declaration ensued. There was a verdict for the plaintiff, damages £100.

The Attorney-General moved for a new trial, on the ground that the defendant had used every precaution which he could be expected to use on such an occasion, and, therefore, was not chargeable with any culpable negligence.

Lord Ellenborough, C. J. The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking

out the priming, the event has unfortunately proved, that the order to Leman was not sufficient; consequently, as by this want of care, the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable.

BAYLEY, J. The gun ought to have been so left as to be out of all reach of doing harm. The mere removal of the priming left the chance of some grains of powder escaping through the touch-hole.

Per curiam.[1] *Rule refused.*[2]

RYLANDS ET AL., Plaintiffs in Error, *v.* FLETCHER, Defendant in Error.

House of Lords, 1868.

[*Reported in L. R.* 3 *H. L.* 330.]

THIS was a proceeding in error against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

In November, 1861, Fletcher brought an action against Rylands & Horrocks, to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the defendants had constructed. The declaration contained three counts, and each count alleged negligence on the part of the defendants; but in this house the case was ultimately treated upon the principle of determining the relative rights of the parties independently of any question of personal negligence by the defendants in the exercise of them.

The cause came on for trial at the Liverpool summer assizes of 1862, when it was referred to an arbitrator, who

[1] ABBOTT, J, absent.

[2] Compare Hagerty *v.* Powers, 66 Cal. 368 (1885); Chaddock *v.* Plummer, 88 Mich. 225 (1891); Harris *v.* Cameron, 81 Wis. 239 (1892).

was afterwards directed, instead of making an award, to prepare a special case for the consideration of the judges. This was done, and the case was argued in the Court of Exchequer in Trinity Term, 1865.

The material facts of the case were these: The plaintiff was the lessee of certain coal mines known as the Red House Colliery, under the Earl of Wilton. He had also obtained from two other persons, Mr. Hulton and Mr. Whitehead, leave to work for coal under their lands. The positions of the various properties were these: There was a turnpike road, leading from Barry to Bolton, which formed a southern boundary to the properties of these different persons. A parish road, called the Old Wood Lane, formed their northern boundary. These roads might be described as forming two sides of a square, of which the other two sides were formed by the lands of Mr. Whitehead on the east, and Lord Wilton on the west. The defendants' grounds lay along the turnpike road, or southern boundary, stretching from its centre westward. On these grounds were a mill and a small old reservoir. The proper grounds of the Red House Colliery also lay, in part, along the southern boundary, stretching from its centre eastward. Immediately north of the defendants' land lay the land of Mr. Hulton, and still farther north that of Lord Wilton. On this land of Lord Wilton the defendants, in 1860, constructed (with his Lordship's permission) a new reservoir, the water from which would pass almost in a southerly direction across a part of the land of Lord Wilton and the land of Mr. Hulton, and so reach the defendants' mill. The line of direction from this new reservoir to the Red Colliery mine was nearly southeast.

The plaintiff, under his lease from Lord Wilton, and under his agreements with Messrs. Hulton and Whitehead, worked the mines under their respective lands. In the course of doing so, he came upon old shafts and passages of mines formerly worked, but of which the workings had

long ceased; the origin and the existence of these shafts and passages were unknown. The shafts were vertical, the passages horizontal, and the former especially seemed filled with marl and rubbish. Defendants employed, for the purpose of constructing their new reservoir, persons who were admitted to be competent as engineers and contractors to perform the work, and there was no charge of negligence made against the defendants personally. But in the course of excavating the bed of the new reservoir, five old shafts, running vertically downwards, were met with in the portion of the land selected for its site. The case found that "on the part of the defendants there was no personal negligence or default whatever in or about, or in relation to, the selection of the said site, or in or about the planning or construction of the said reservoir; but, in point of fact, reasonable and proper care and skill were not exercised by, or on the part of, the persons so employed by them, with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear."

The reservoir was completed at the beginning of December, 1860, and on the morning of the 11th of that month, the reservoir, being then partially filled with water, one of the aforesaid vertical shafts gave way and burst downwards, in consequence of which the water of the reservoir flowed into the old passages and coal-workings underneath, and by means of the underground communications then existing between them and the plaintiff's workings in the Red House Colliery, the colliery was flooded and the workings thereof stopped.

The question for the opinion of the court was whether the plaintiff was entitled to recover damages by reason of the matters hereinbefore stated. The Court of Exchequer, Mr. Baron Bramwell dissenting, gave judgment for the defendants.[1] That judgment was afterwards reversed in

[1] 3 H. & C. 774.

the Court of Exchequer Chamber.[1] The case was then brought on error to this house.

Sir R. Palmer, Q. C., and *Mr. T. Jones, Q. C.*, for the defendants (now plaintiffs in error):

In considering this case, it is important to remember that the communications between the workings of the plaintiff and the old shafts and pits were not known to the defendants. The question, therefore, is, whether they can be held responsible for an injury which, as the possible cause of it was unknown to them, they could not by any care on their part prevent. It is submitted that they are not liable. Every man has a right to use his own land for lawful purposes, and if he does so, and does so without knowledge that he will thereby occasion injury to another, he cannot be held responsible should injury occur. For that is a case which comes within the legal description of *damnum absque injuria*. The principle adopted by the Exchequer Chamber here, that though a man uses his lawful rights without malice and without knowledge of danger, he may still be liable for any mischief occurring from such use, is too wide. It would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously. Now knowledge of possible mischief is of the very essence of the liability incurred by occasioning it. Acton *v.* Blundell;[2] Chasemore *v.* Richards.[3] That has always been recognized as one of the principles of our law, and has, as such, been adopted by the courts in America. Pixley *v.* Clark;[4] Smith *v.* Kenrick[5] showed that where two mines lay contiguous to each other, but neither was subject to a servitude to the other, each owner had a right to work his own mine in the best way for his own benefit, and if he did so without negligence, was not liable to the other for prejudice to his property which might thereby arise. That case is very

[1] 4 Ibid. 263; Law Rep. 1 Ex. 265.
[2] 12 M. & W. 324.
[3] 7 H. L. C. 349.
[4] 32 Barbour's Reports.
[5] 7 C. B. 515.

important, for there knowledge existed which it is not pretended existed here. In the time of Bracton, the rule existed that injury created to one man by the lawful act of another, if that act was done without wilfulness or negligence, would not afford a title to a claim of damages.[1] That must be the rule in the present day, for otherwise no man could use his property, however carefully, without being liable to pay damages for mischief which, without any fault or even any knowledge of his own, might afterwards occur. Chadwick *v.* Trower[2] gives the answer to that proposition. There it was held that a man who pulled down his own wall was not bound to give notice to his neighbor of his intention to do so, and was not liable to that neighbor in damages merely because, in pulling it down, he damaged an underground wall of his neighbor's, of the existence of which he had no knowledge. That case, so far as principle is concerned, exactly resembles the present. Tenant *v.* Goldwin[3] does not affect the defendants here, for there all the facts were fully known to both parties, and the court merely decided that, that being so, the defendant was bound to keep his own property in such a state that it should not injure his neighbor. Bagnall *v.* The Northwestern Railway Company[4] at first sight appears much nearer the present case; but there all the facts as to the condition of the soil and the parts worked through were known, and in that respect, therefore, the difference between the two cases is complete. The want of knowledge here is an essential ingredient in the case. The principle laid down by Mr. Baron Bramwell in this case, that a man, in the use of his own property, must take care that he does not injure that of his neighbor, is true in itself, but cannot be applied to a case like the present, where the injury which happens is merely consequential, and is the result of circumstances as to which neither knowledge of them, nor negligence in pro-

[1] Bract. bk. 4, c. 37, fol. 221.
[2] 6 Bing. N. C. 1.
[3] 1 Salk. 360; 2 Ld. Raym. 1089.
[4] 7 H. & N. 423; 1 H. & C. 544.

viding against them, can be imputable to the defendants. Indeed, the fault, if any, is with the plaintiff. He began the work in his mines some years ago, and in the progress of it he came to know of these passages; he ought to have communicated his knowledge of them to the defendants, who might then have provided against this mischief, but he did not. The obligation to give notice of the circumstances, if they were to be relied on as creating any liability in another party, was recognized in Partridge *v.* Scott.[1] Here, too, the defendants employed competent persons to do something which was in itself perfectly lawful, and they cannot be held liable in damages without clear evidence of impropriety or negligence on their own parts. The person who actually does the work is alone liable. Baker *v.* Hunter;[2] Richards *v.* Hayward;[3] Peachey *v.* Rowland;[4] Allen *v.* Hayward.[5] Sutton *v.* Clarke[6] is clearly in favor of the defendants. No pretence for setting up this charge of neglect was suggested in this case. On the facts, therefore, as well as the principles of law, the judgment against the defendants cannot be supported.

Mr. Manisty, Q. C., and *Mr. J. A. Russell, Q. C.*, for the plaintiff below (now the defendant in error):

The mines here were worked in the ordinary way, and their owner is entitled to be protected against a flow of water which destroyed his works, and which was occasioned by the act of others. If the water had come into his mine from natural causes alone, he could not have complained; but it came in through the act of the defendants in making their reservoir. They introduced there water which would not have come there in a natural way, and they were therefore bound to see that it did not produce mischief to any one. They brought the mischief on the land, and they were bound to guard against the conse-

[1] 3 M. & W. 220.
[2] 31 L. J. (Ex.) 214; 7 H. & N. 1.
[3] 2 Man. & G. 575.
[4] 13 C. B. 182.
[5] 7 Q. B. 960.
[6] 6 Taunt. 29.

quences. Baird *v.* Williamson[1] really disposes of this case, on the ground of the distinction between water flowing on to land from natural gravitation, and water brought there through the act of an adjoining landowner. Smith *v.* Kenrick[2] had established that each of two mine owners might work his own mine in the ordinary and proper way, and that if, from such working, and without negligence on the part of the one, an injury was occasioned to the property of the other, the former was not liable. That proposition is not contested; but that case implied that if the injury was occasioned by something which was not ordinary working, the injury thereby occasioned would be the subject of a claim for damages. Here the construction of the reservoir was not an ordinary working of the property of the defendants. Baird *v.* Williamson completed what Smith *v.* Kenrick had left deficient, and the two taken together established beyond all question the title of the plaintiff here to recover damages. The case of Sutton *v.* Clarke[3] merely decided that a public functionary acting to the best of his judgment and without malice, and obtaining the best assistance he can, is not liable to a claim for damages if what he does operates to the prejudice of an individual. That case does not affect the present, except that it indirectly confirms the doctrine now contended for, — namely, that though the act was in itself lawful, yet if the doing of it occasions an injury to any one, the person injured has a right of action. The principle that an injury, though only consequent on an act, and not developing itself till some years after the act done, may still be the subject of a claim for damages, was settled in Backhouse *v.* Bonomi,[4] and there the act which occasioned the injury was in itself a lawful act, and there had been nothing but the mere ordinary working of the mines; yet, as it resulted in a mischief to the property of other

[1] 15 C. B. N. S. 376.
[2] 7 C. B. 515.
[3] 6 Taunt. 29.
[4] El. Bl. & El. 622; 9 H. L. C. 503.

people, it was held to be a subject for compensation. In Hodgkinson *v.* Ennor [1] the defendant had polluted a stream by works on his own land, which works were not in themselves illegal, but they were not the natural mode of working the property, and they produced a mischief to his neighbor; he was therefore held responsible in damages. Lord Chief Justice Cockburn there said that it was a case in which the maxim "*Sic utere tuo ut alienum non lædas*" applied; and Mr. Justice Blackburn declared "the law to be as in Tenant *v.* Goldwin,[2] that you must not injure the property of your neighbor, and, consequently, if filth is created on any man's land, 'he whose dirt it is must keep it, that it may not trespass.'" Making a shaft to a mine is, no doubt, a part of the proper and ordinary way of working mining property, but the shaft must be so made and fenced that it shall not occasion injury to the property of others; and if not so made and kept, any injury thereby occasioned must be compensated. Williams *v.* Groucott [3] and Imperial Gas Company *v.* Broadbent [4] went altogether on that principle; so did Bamford *v.* Turnley [5] and Tipping *v.* St. Helen's Smelting Company.[6]

As was said in Lambert *v.* Bessey,[7] "if a man doeth a lawful act, yet if injury to another ariseth from it, the man who does the act shall be answerable;" and many illustrations of the principle are there given. Every one of them justifies the argument which seeks to fix liability on these defendants.

The mill-owners are liable here, though they employed a competent engineer and contractor, and were not themselves guilty of any personal negligence. The principle, *qui facit per alium facit per se*, applies here, and the principal is liable for the negligence of his agent. Paley;[8] Pickard *v.* Smith.[9]

[1] 4 B. & S. 229.
[2] 2 Ld. Raym. 1089; Salk. 360.
[3] 4 B. & S. 149.
[4] 7 H. L. C. 600.
[5] 3 B. & S. 62.
[6] 4 B. & S. 609; 11 H. L. C. 642.
[7] Sir T. Raym. 421.
[8] Pr. & Ag. 262.
[9] 10 C. B. N. S. 470.

Mr. T. Jones replied.

THE LORD CHANCELLOR (Lord Cairns):

My Lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicated with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed; it was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was

constructed and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts broke through those shafts. The water passed down and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case, stating the facts to which I have referred, was argued, was of the opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, — the case of Smith *v.* Kenrick in the Court of Common Pleas.[1]

[1] 7 C. B. 515.

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, — and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it, the evil arose to which I have referred, — the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, — then for the consequence of that, in my opinion, the defendants would be liable. As the case of Smith *v.* Kenrick is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same court, — the case of Baird *v.* Williamson,[1] — which was also cited in the argument at the bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his own peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing

[1] 15 C. B. N. S. 317.

that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this, we think, is established to be the law whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion, I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH:

My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however care-

ful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of Lambert *v.* Bessey, reported by Sir Thomas Raymond;[1] and the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum.* This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of Smith *v.* Kenrick,[2] and Baird *v.* Williamson.[3] In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water, in that

[1] Sir T. Raym. 421. [2] 7 C. B. 564. [3] 15 C. B. N. S. 376.

case, was only left by the defendant to flow in its natural course.

But in the later case of Baird *v.* Williamson, the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially, he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

Applying the principle of these decisions to the case now before the house, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right; the plaintiff had a right to work his coal through the lands of Mr. Whitehead, and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in Smith *v.* Kenrick, the person working the mine, under the close in which the reservoir was made, had a right to mine and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own,

brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff; and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Judgment of the Court of Exchequer Chamber affirmed.[1]

LORDS' JOURNALS, 17th July, 1868.

Attorneys for plaintiffs in error: *N. C. & C. Milne.*
Attorneys for defendant in error: *Norris & Allen.*

JOHN W. GRIGGS *v.* ERNST FLECKENSTEIN.

Supreme Court of Minnesota, 1869.

[*Reported in* 14 *Minn.* 81.]

THIS action was commenced in the District Court for Rice County. The complaint alleges substantially that

[1] Compare May *v.* Burchett, 9 Q. B. 101 (1846); Jackson *v.* Smithson, 15 M. & W. 56 (1846); Hammack *v.* White, 11 C. B. N. S. 588 (1862); Everett *v.* Hydraulic Flume Tunnel Co., 23 Cal. 225 (1863); Pixley *v.* Clark, 35 N. Y. 520 (1866); Shipley *v.* Fifty Associates, 106 Mass. 194 (1870); Swett *v.* Cutts, 50 N. H. 439 (1870); Gray *v.* Harris, 107 Mass. 492 (1871); Wilson *v.* New Bedford, 108 Mass. 261 (1871); Cahill *v.* Eastman, 18 Minn. 324 (1872); Nitro-Glycerine Case, 15 Wall. 524 (1872); Losee *v.* Buchanan, 51 N. Y. 476 (1873); Brown *v.* Collins, 53 N. H. 442 (1873); Smith *v.* Fletcher, L. R. 9 Ex. 64 (1874); Garland *v.* Towne, 55 N. H. 55 (1874); Nichols *v.* Marsland, L. R. 10 Ex. 255 (1875); Marshall *v.* Welford, 38 N. J. L. 339 (1876); Gorham *v.* Gross, 125 Mass. 232, 238 (1878); Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. 126, 150–154 (1886); Laflin & Rand Powder Co. *v.* Tearney, 131 Ill. 322 (1890); Collins *v.* Chartiers Valley Gas Co., 139 Pa. 111 (1891). See also Bishop on Non-Con. Law, § 839, n. (2); Holland's Jurisprudence (6th ed.) 97.

defendant carelessly left his team, consisting of a span of horses and double sleigh, without being hitched, fastened, held, or in any manner secured or attended, in the principal street of Faribault; that said horses started and ran violently along said street against another team, consisting also of a span of horses and sleigh, standing securely fastened at the side of the street, frightening them, and causing them to break loose, and run across the street against a horse and sleigh belonging to plaintiff, damaging plaintiff's sleigh, and so seriously wounding his horse as to occasion its death.

The answer, among other things, admits the running away of defendant's team, and the injury to plaintiff's horse as alleged; denies that defendant's team caused the said other team to run into plaintiff's horse and sleigh; alleges that the injury was caused by plaintiff's carelessness in leaving his horse alone and unhitched, by reason whereof, the plaintiff's horse, becoming frightened, moved into the track of the runaway team doing the injury; and that but for the unauthorized and careless interference of third parties, by whom the team doing the injury was swerved from their course, they would not have run against the team of any one.

The cause was tried before a jury.

The rulings of the court upon the admissibility of testimony, and the facts established, sufficiently appear in the opinion of the court.

After the evidence was closed and the parties had rested, the plaintiff's counsel, among other things, requested the court to charge the jury, —

First. That the right of the plaintiff to recover in this action is not affected by the action of the crowd in trying to stop the defendant's team, whether said crowd did or did not by their action cause the team to swerve from the course it otherwise would have taken.

Second. That if the jury should find that the action of the crowd swayed the horses of the defendant from the

course they would have taken but for said action, and that the collision would not have taken place or the damage been done had the crowd not interfered, yet the defendant is equally responsible as if no such interference had occurred.

The court refused each of said requests. To such refusals the plaintiff by his counsel severally accepted.

The defendant by his counsel requested the court to give in charge to the jury the following propositions: —

1. If they find from the evidence that if the defendant's horses became frightened while standing in the public street, even if negligently left unhitched by the defendant, and ran down the street, and that one or more persons rushed into the street, and strove, by hallooing, swinging of hats, and other noise, to stop them, and the defendant's team shied off to the side of the street and ran into the team of Matthews, thereby frightening them and causing them to run away, the defendant is not responsible for any injury caused by said last-named team, unless the jury are able from the evidence to say that even if said swinging of hands, hallooing, or other demonstrations of bystanders had not occurred, the injury to plaintiff's horse would have taken place.

The court gave this proposition with the following oral explanation and modification: —

That if the acts of the crowd caused the injury by driving the team from the course which they would otherwise have taken and upon the team of Matthews, the defendant is not responsible, even if he negligently left his horses unhitched, because there must be not only negligence but injury resulting therefrom to render the defendant liable, but unless they were entirely satisfied from the evidence that the defendant's team would not have run upon the team of Matthews if it had not been swayed from its course by the crowd, they must find for the plaintiff.

To which proposition and modification plaintiff excepted.

3. That if they shall find from the evidence that the defendant's team was negligently left unhitched by the defendant in the public street, and becoming frightened ran

away, and, while running down the centre of the street, were, by shouts and swinging of hands, or hats, or other noises by third parties, swerved from their course to the side of the street where the team which did the immediate injury was standing, thus frightening them and causing them to run against the plaintiff's horse, which without such acts of third parties the defendant's team would not have done, the defendant is not responsible.

The court gave this proposition, and plaintiff excepted.

The judge also charged the jury that the leaving of the plaintiff's horse in the street unhitched was an act of negligence, which, if it contributed to the injury, would debar the owner from recovering, but which would not affect the right of the owner to recover if the jury believe that the injury would have occurred even if the horse had been properly hitched.

To which instruction the plaintiff's counsel excepted.

The jury found a verdict for the defendant. The plaintiff made a motion for a new trial, which was denied.

Judgment was entered for defendant. The plaintiff appeals therefrom to this court.

Perkins & Mott, for appellant.

G. E. Cole, for respondent.

By the Court,[1] McMillan, J. The plaintiff brings this action to recover damages for the loss of a horse, which was killed under the following circumstances: —

The defendant left his team, consisting of a span of horses and a double sleigh attached thereto, standing in the principal business street of the town of Faribault without being hitched, fastened, held, or in any manner secured. It started and ran violently along the street, and against another team, belonging to one Matthews, likewise consisting of two horses attached to a double sleigh, standing properly hitched at the side of the street, frightening the latter team so that it broke loose and ran with the sleigh attached to it across

[1] The reporter's statement of the arguments of counsel is omitted.

the street and against a horse and sleigh belonging to the plaintiff, breaking the plaintiff's sleigh, and injuring his horse so that he died in two or three days thereafter. There is evidence tending to show that before the defendant's horses ran into Matthews's team, and while they were running down the street, a crowd of persons came out into the street and hallooed and raised their hats for the purpose of stopping the horses; that this occasioned the horses to swerve from the course they were taking, and drove them across the street so that they hit Matthews's team. The plaintiff's horse at the time of the injury was unhitched and at the side of the street. The plaintiff's son, who had driven his father's horse to this place, left him unhitched, and went into a store near by. He testified upon the trial that while in the store, he heard the first runaway team (defendant's) as it passed, and went out on the sidewalk, and was on the sidewalk, about eight feet from his horse, when it was injured. Then he saw a pair of horses with a sleigh running down the street. They started his father's horse, which was standing near the sidewalk in the street, a few feet from the place he had left him; that he spoke to the horse, and he stopped, and immediately the pole of the other double sleigh struck his horse. There is testimony on the part of the defendant tending to show that when the first runaway team passed it started the plaintiff's horse; that he turned and moved towards the street; and that if plaintiff's horse had not stirred, the second team would have passed without hitting him.

Upon the trial of the cause, the plaintiff being upon the stand as a witness on his own behalf, the plaintiff's counsel asked the witness the following question: "Was the horse trustworthy to stand unhitched in the street?" Objected to by defendant's counsel, on the ground that it was immaterial. The objection was sustained by the court, and the question excluded, to which the plaintiff excepted.

Several exceptions were taken by the plaintiff to the refusal of the court to charge in accordance with requests

submitted by him, and to the charge of the court in accordance with requests submitted by the defendant, which we need not consider in detail.

The case involves, substantially, three points, — (1) The effect upon the rights of the parties to this action of the conduct of the persons or crowd in hallooing and waving their hats in front of the runaway team of defendant in order to stop it; (2) The effect upon the plaintiff's right to recover, of the fact that the horse had been left unhitched in the street; (3) The admissibility of the evidence sought to be elicited by the question put to the plaintiff as a witness.

The rule of law is well settled that where the plaintiff has been injured in his person or property by the wrongful act or omission of the defendant, or through his culpable negligence, the fact that a third party, by his wrong or negligence, contributed to the injury, does not relieve the defendant from liability. McMahon *v.* Davidson, 12 Minn. 372, 373.

There is no controversy about the fact that the running away of the defendant's team was attributable to and occurred at first through the negligence of the defendant. The team had not stopped, or been at all restrained in their flight, at the time of the appearance of the persons or crowd in the street. The attempt to stop the team was not successful, but, as we have seen, may have swerved the horses from the direct course in which they were going, and occasioned the collision with the Matthews team hitched at the side of the street. The attempt to stop the team in their course through the street was certainly proper, and would ordinarily be expected. Under such circumstances, there is nothing in the testimony which tends to show that there was anything wrongful, careless, or improper in the means resorted to by these persons to accomplish this purpose; they are therefore entirely innocent and free from blame. If they contributed to the injury in any degree, they were innocent agents in the mat-

ter, and as their interference in this manner was proper, and was such an interference as would be embraced in the ordinary results of such an occurrence as this runaway, it would in no wise excuse the defendant, or relieve him from the injury resulting from the runaway which occurred through his negligence. The testimony all shows that the defendant's team did not stop from the time it started to run away at the post-office until after it came in collision with and started the Matthews team; that the interposition of the crowd or persons in the street was for the purpose of stopping the runaway team, and before its collision; nor is there any evidence to show that the team would have stopped if the crowd had not interposed.

It is evident, therefore, that the running away, from the starting of defendant's team till the collision, was a single occurrence, and whatever influence the interposition of the crowd had in occasioning the collision, it was not the sole cause of it; that the running away which occurred through the defendant's negligence was, in part at least, the occasion of it. Both causes, therefore, in the most favorable view for the defendant, must have contributed to it; and as the defendant is responsible through his negligence for one of the agencies through which the injury occurred, under the rule we have stated, he is liable, although without the agency of both causes the accident would not have transpired. Matthews's team, it appears, was hitched to a post in front of McGuery's store, and there is nothing tending to show any negligence or carelessness on the part of the owner of the team.

The immediate cause of the starting of Matthews's team was the collision of the defendant's team with it, and the injury of the plaintiff's horse was caused directly by Matthews's team striking it. This brings the case within the rule that the injury must be the natural and proximate result of the act complained of. The collision with Matthews's team was the natural, but not necessary, consequence of the running away of defendant's team in the street. All

the consequences which actually resulted in this case from the running away of defendant's team might, we think, reasonably have been expected to occur by the running away of any team, under similar circumstances, in the principal business street of a town, and the running away of the defendant's team was the efficient cause of the injury to plaintiff's horse, because it put in operation the force which was the immediate and direct cause of the injury. 2 Greenl. Ev., secs. 256, 268, 268 *a*; 3 Parsons on Contracts, 179, 180.

For these reasons, the first and second requests submitted by the plaintiff, which were refused, should have been given to the jury; and the first request submitted by the defendant, as explained and modified by the court, together with the third request submitted by the defendant, and given in charge to the jury, should have been refused.

It is also a well-settled rule, that, in an action for injury to person or property, the plaintiff cannot recover if he contributed to the injury by his own culpable negligence, or if, by the exercise of ordinary care, he could have avoided the injury. 1 Chit. Pl. 127, and authorities cited.

The question of the plaintiff's negligence in this case was one of fact, to be determined by the jury, under the instructions of the court as to what constitutes negligence. St. Paul *v.* Kuby, 8 Minn. 171; Johnson *v.* Winona & St. P. R. Co., 11 id. 307. The degree of care required of the plaintiff, or those in charge of his horse, at the time of the injury, is that which would be exercised by a person of ordinary care and prudence, under like circumstances. It cannot be said that the fact of leaving the horse unhitched is in itself negligence. Whether it is negligence to leave a horse unhitched must depend upon the disposition of the horse, — whether he was under the observation and control of some person all the time, and many other circumstances; and is a question to be determined by the jury from the facts of each case. Lynch *v.* Nurdin, 1 Q. B. 29; 1 Hilliard on Torts, 154; Park *v.* O'Brien, 23 Conn. 339.

It was therefore proper for the plaintiff to show, by his testimony, that his horse was trustworthy to stand unhitched in the street, and the question put to the witness for that purpose should have been permitted. It was also erroneous to charge the jury that "the leaving of the plaintiff's horse in the street unhitched was an act of negligence."

For the reasons stated, the judgment below is reversed, and the verdict of the jury set aside, and a new trial granted.[1]

LINNEHAN v. SAMPSON.

Supreme Judicial Court of Massachusetts, 1879.

[*Reported in* 126 *Mass.* 506.]

TORT. The declaration alleged that the defendant, on June 2, 1877, was the owner of a bull; that the bull was wild and vicious, and it was unsafe to drive or permit the bull to go through any public highway, without his being tied down or secured, so as to prevent injury to any person on the highway, all of which the defendant well knew; that the defendant wrongfully, carelessly and negligently drove the bull, so being wild and vicious, and not properly secured, in a certain highway; and that the bull ran with great violence against the plaintiff, he then being on the highway, and injured him. Answer: 1. A general denial. 2. Contributory negligence.

At the trial in the Superior Court before Brigham, C. J., the plaintiff introduced evidence tending to show that on June 10, 1877, he was walking in Lawrence, when his attention was directed to cries of help on a street at a right angle with the street he was on; that when he turned the corner he saw a man lying on his back in the middle of the road, holding a rope attached to a ring in the nose of a bull, and the bull attempting to gore him; that the plain-

[1] Compare Read v. Nichols, 118 N. Y. 224 (1890).

tiff went towards the bull and within a few feet of him, but did not attempt to assist the man whom the bull was trying to gore, because he was afraid of the bull, as he appeared to be dangerous; that the bull, by the detaching of the ring from his nose, escaped from the man holding him and rushed towards the plaintiff, who ran towards the gate of a yard on the side of the street, and while in the act of entering the gate, was tossed by the bull into the air, fell senseless on the street, and, while lying there, was gored by the bull, and received the injuries complained of; that the defendant was, at the time, the owner of the bull, and his servant, by his direction, was then leading him through the street when many persons were walking there.

The only evidence, on the part of the plaintiff, of the dangerous character of the bull, was that afforded by the conduct of the bull at the time of the injury and its circumstances, and a declaration by the defendant to the plaintiff and his wife, that his servant was careless in leading the bull through the streets, and that he ought to have led him tied behind a wagon, as he had been led on a former occasion.

There was evidence, on the part of the defendant, that the bull was nearly three years old, and small of his age; and that after he was one year old he was kept for a year on a farm in New Hampshire, and afterwards, until the day of the plaintiff's injury, on a farm in Methuen, from which, on that day, the defendant's servant was removing him to the defendant's farm in North Andover; that the bull had never exhibited viciousness of disposition, but although, when conducted from New Hampshire to Methuen, he was tied behind a wagon, yet on the farm where he had been kept he had been managed by a snap-ring fastened in his nostrils by a spring and attached to a rope, and was tractable when thus managed; and that the defendant had no knowledge of any exhibition of viciousness or dangerousness of the bull before the plaintiff's

injury; that, while the servant was leading the bull by the rope, the white dress and red scarf of a girl excited the bull, the servant struck him, and thereupon the bull threw the servant down and was attempting to gore and trample on him, when some person struck the bull, and he rushed forward and leaped over the servant, detaching the snap-ring from his nose as he did so, and pursued and injured the plaintiff; that the man who had the care of the bull at the defendant's farm had found the bull to be gentle, and had never seen anything dangerous or vicious about him, and that with a snap-ring he could lead him like a dog. A snap-ring, such as was used in leading the bull on the occasion of the plaintiff's injury, and also a ring of different style, such as is used in managing bulls, and was claimed by the plaintiff to be more adapted to safety, were exhibited to the jury at the trial.

The defendant requested the judge to instruct the jury as follows: "1. That, as plaintiff alleges in his declaration that before and at the time of the injury the defendant's bull was wild and vicious, and was unsafe to be led through the public streets, and the defendant knew the same, the plaintiff, in order to maintain this action, must prove that the bull was wild and vicious before and at the time of the alleged injury, and was unsafe to be led through the streets unless confined, and that the defendant had such previous knowledge of the wild and vicious habits and inclinations of said bull. 2. That the defendant is not liable for the injuries wilfully committed by his bull, unless the plaintiff proves that the defendant had actual notice of the habits and inclinations of the bull to commit the injury complained of, and that having such notice, he did not use reasonable care in taking care of said bull. 3. That if the plaintiff, when he saw the servant on the ground, and the bull goring him, and knew the bull was dangerous, and, knowing the dangerous character of said bull, made an attack on the bull, or went so near him that the bull could attack him, he was guilty of contributory negligence.

4. That if the plaintiff knew, or had reasonable cause to believe, that it was dangerous to go to the assistance of the servant when the bull had him down and was goring him, and did so, it was contributory negligence, and the calls of humanity would be no excuse. 5. That if the bull was only two years and eleven months old, and had no wild and dangerous habits or tendencies known to the defendant or his keeper, and the defendant was informed that he was gentle, and could be led like a dog, then it was not negligence on the part of defendant or his servant to attempt to lead him through the public streets with a snap-ring used by his keeper to lead him. 6. That if the snap-ring used in leading said bull was such as one made and used for the purpose of leading such animals, then the defendant's servant, in using the same to lead such bull, was in the exercise of due care."

The judge refused to give these instructions, but instructed the jury as follows: "The plaintiff, in order to recover, must prove that the bull which caused his injury was the defendant's property, and had such propensities, known to the defendant, as caused him to be a dangerous animal when led by one person only upon the streets of such a city as Lawrence, in the day-time, by means of a rope attached to a snap-ring fastened to the bull's nose, and, being thus dangerous, was led by the defendant's servant, acting within the scope of his general employment, or by the defendant's specific direction; that the conduct of the defendant's servant in thus leading the bull was negligent in view of the propensities of the bull known to the defendant, or of the known, ordinary and usual disposition and propensities of such animals; and that the plaintiff's conduct, on the occasion of his injury, was not wanting in reasonable prudence and caution, in view of all the circumstances of his injury. In the absence of any specific evidence of any exhibitions of viciousness or unruliness by the defendant's bull, which had been seen by or brought to the knowledge of defendant, he would not

be responsible for injuries to any person caused by such propensities, unless such propensities were usual and ordinary in bulls like the defendant's bull; in which case the defendant might reasonably be supposed, as owner of the bull, to have known such ordinary and usual propensities, and it would have been negligence in him not to have adapted his use and treatment of him to such ordinary and usual propensities."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. C. Sanborn, for the defendant.

D. Saunders & C. G. Saunders, for the plaintiff, were not called upon.

AMES, J. The instructions to the jury were sufficiently favorable to the defendant, and were all that the case required. It was ruled that in order to recover in this action, the plaintiff must prove that the bull had such propensities, known to the defendant, as caused him to be a dangerous animal when led by one person only in the day-time upon the streets of a city, in the manner described in the evidence reported in the bill of exceptions; and also that it must be proved that in thus leading the bull, the defendant's servant was negligent, in view of the propensities of the bull known to the defendant, or of the known, ordinary and usual disposition and propensities of such animals. It might well be that previously to the injury the defendant had had no trouble in managing the animal, and no knowledge of anything specially or peculiarly vicious in his habits or inclinations. But the jury may have believed that he knew, what is a matter of common knowledge, that a bull is an excitable and powerful animal, and that if from any accidental or unexpected cause he should become excited while led or driven through a public street, he might be dangerous. Hudson *v.* Roberts, 6 Exch. 697. It is impossible to say, upon the evidence reported, that the jury would not be justified in finding that the knowl-

edge, which by the ruling of the court was necessary to the maintenance of the action, was satisfactorily proved. There was testimony to the effect that the defendant had said that it was careless so to lead the bull through the streets, and that he ought to have been tied behind a wagon, as he had been once before. The jury, if they believed this evidence, might well have considered it as an admission that he knew that the animal needed to be kept under control, and also that he knew that the control which his servant had applied for the purpose of leading him through the streets was insufficient. In Lyons *v.* Merrick, 105 Mass. 71, it was held that the owner or keeper of animals of a vicious disposition or mischievous habits, of which the owner had previous actual or implied notice, is bound at his peril to keep them at all times and in all places properly secured, and is responsible to any one who, without fault on his own part, is injured by them. The case of Hewes *v.* McNamara, 106 Mass. 281, is to the same effect. If the jury were satisfied that the defendant knew, or ought to have known, that the bull had dangerous propensities, it is unnecessary to prove that on any previous occasion he had actually endangered the life or limb of any person. Worth *v.* Gilling, L. R. 2 C. P. 1. There is certainly some evidence of a scienter in this case, and the question of its weight is not before us. Applebee *v.* Percy, L. R. 9 C. P. 647.

A question was raised at the trial as to contributory negligence on the part of the plaintiff; and it was contended that he was not in the exercise of reasonable care in approaching so near to the bull as he did; and that the calls of humanity would be no excuse. But the question whether the plaintiff's conduct on the occasion of the injury was wanting in reasonable prudence and caution, in view of all of the circumstances, was submitted to the jury as a question peculiarly for them to decide. They were to consider all the circumstances, and among other things, that the life of a fellow-creature was in extreme

danger; but they must have understood that reasonable prudence and caution were elements in the case which the plaintiff must prove. It does not follow, as a matter of law, that in encountering the danger he was necessarily guilty of a want of due and reasonable care. The emergency was sudden, allowing but little time for deliberation. Some allowance might well be made for the confusion of the moment. Buel *v.* New York Central Railroad, 31 N. Y. 314. In Eckert *v.* Long Island Railroad, 43 N. Y. 502, a case of the rescue of a child from being run over by an approaching train, the court say that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." The law does not require cowardice or absolute inaction in such a state of things. Neither does it require in such an emergency that the plaintiff should have acted with entire self-possession, or that he should have taken the wisest and most prudent course, with a view to his own self-preservation, that could have been taken. He certainly may take some risk upon himself short of mere rashness and recklessness. Mayo *v.* Boston & Maine Railroad, 104 Mass. 137. The evidence reported does not conclusively show a want of due care and prudence on his part, and it was therefore properly left to the jury. Lane *v.* Atlantic Works, 107 Mass. 104. What is ordinary care is usually to be settled by the judgment and experience of the jury, and not of the judge. Gaynor *v.* Old Colony Railroad, 100 Mass. 208.

Exceptions overruled.[1]

[1] On the point as to contributory negligence, see Eckert *v.* Long Island Railroad Co., 43 N. Y. 502 (1871); Cottrill *v.* Chicago, Milwaukee & St. Paul Railway Co., 47 Wis. 634 (1879); Pennsylvania Co. *v.* Roney, 89 Ind. 453 (1883); Spooner *v.* D., L. & W. Railroad Co., 115 N. Y. 22 (1889); Peyton *v.* Texas & Pacific Ry. Co., 41 La. Ann. 861 (1889). On driving a dangerous animal, see Ficken *v.* Jones, 28 Cal. 618 (1865).

SISK *v.* CRUMP.

Supreme Court of Indiana, 1887.

[*Reported in* 112 *Ind.* 504.]

APPEAL from Circuit Court, Bartholomew County; Nelson R. Keyes, Judge.

Sarah F. Sisk, plaintiff, sued F. Crump, defendant, for damages for the death of her horse, by being entangled in a barbed-wire fence. Demurrer to the complaint sustained, and defendant appealed.

Francis T. Hord and *M. D. Ewing*, for appellant.

Norton & Smith, for appellee.

ELLIOTT, J. Stated in a condensed form, the material allegations of the appellant's complaint are these: On and prior to May 5, 1885, the appellee owned 15 acres of land, bounded on the east by a public street of the city of Columbus, and along the line of this street he had constructed a barbed-wire fence. The fence was composed of wooden posts and five strings of barbed-iron wire; it was negligently constructed, the posts being insufficient to keep the wire at a proper tension, and the wires were not drawn into proper position. The wires were armed with sharp iron barbs, placed along them at a distance of two inches apart. They were negligently suffered to sag down near the ground; they hung loosely from the posts, and in such a condition as that a horse, coming in contact with them, would be entangled and thrown down. The fence was not such as a good husbandman would construct or maintain, but was insufficient and dangerous; its height not being sufficient to keep off horses or cattle, and there being no plank or other thing to warn them of the existence of the fence. The fence could have been made safe by placing a board along the top of it, and the wires could have been kept at a proper height and tension, but the

defendant, knowing its dangerous condition, suffered it to remain insufficient to warn off animals. It was not sufficient in height, as the defendant knew, to prevent animals from attempting to cross it. On the fifth day of May, 1885, the horse escaped from the stable of the plaintiff, in which it had been fastened, and, without fault on her part, wandered upon the street bounding the defendant's land. At that time the land was covered with green grass, on which the horses of the appellee were feeding. The appellant's horse was attracted by the green pasture and the horses feeding on it, and attempted to cross into the field. In attempting to cross the fence it was, by reason of the dangerous and unsafe condition thereof, entangled in the loose wires, thrown down, and killed. The proper county and city officers had, by orders duly made, authorized owners of horses and cattle to permit them to run at large.

The complaint cannot be upheld on the ground that erecting a barbed-wire fence along the line of a highway, but on private property, is in itself an actionable wrong. The courts cannot say, as matter of law, that erecting such a fence is a tort. We cannot, therefore, yield to the contention of counsel, that the act of an individual in erecting a fence of that kind in itself renders him liable to one who sustains an injury. Courts cannot judicially know that such a fence is dangerous. Our statute recognizes the right to use such fences, for it is expressly provided that railroad companies may use them in fencing their tracks. Act 1885. The complaint before us, however, does not rest solely on the theory that the erection of a barbed-wire fence is necessarily a tort. It goes much further, and with great particularity avers that the fence was so constructed as to be dangerous to horses and cattle passing along the highway. Nor does it stop there. It avers that beyond the fence was growing grass on which horses were feeding, and that these things would attract horses, and induce them to attempt to cross the fence and enter the

inclosure. There are, therefore, two important elements to be considered: First, the negligence in constructing and knowingly maintaining a dangerous fence along the line of a highway; second, the probability that animals would be attracted by what they saw within the inclosure, and would probably attempt to enter it. These two elements exert an important influence upon that branch of the case which presents the question whether the appellee's act was culpably negligent.

It is well settled that a lawful act may be done in such a negligent manner as to make the person who does it a wrong-doer. It may be, therefore, that although erecting a barbed-wire fence is not in itself a tort, yet the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence. A thing may not be dangerous if properly constructed, but dangerous if improperly constructed. The complaint before us shows that the appellee was negligent in constructing and maintaining the fence, and on that point we have no hesitation in declaring it to be sufficient. Negligence is not always actionable. A man may do many negligent things on his own premises, and yet not incur any liability. Negligence is only actionable where it involves a breach of duty. This rule is illustrated by the cases which hold that there can be no recovery for injuries caused by the negligence of the owner of land in suffering the premises to become unsafe, unless the injured person came on the land under an express or implied invitation. Nave *v.* Flack, 90 Ind. 205; Railroad Co. *v.* Griffin, 100 Ind. 221; Railroad Co. *v.* Pitzer, 109 Ind. 179. There can, as a general rule, be no action, although there is negligence, unless the party guilty of negligence was under some duty to the person who sustains the injury. While it is esential that the defendant should be under some duty to the plaintiff, it is not essential that the duty should be directly owing to him as an individual. A defendant who owes a duty to the community, owes it, as

a general rule, to every member of the community, and if any member suffers especial injury from a breach of that duty, an action will lie.

The pivotal question in this case is, therefore, whether the defendant was under a general duty to maintain the wire fence so that it would not inflict injury upon animals which might be tempted from the highway into his inclosure. The theory of the complaint is that the horse was injured while attempting to cross the fence into the defendant's inclosure, and not that it was injured while simply wandering along the highway. If the horse had been injured while going along the highway, a very different question would have been presented; but that is not the case which the complaint undertakes to make. The case is therefore not governed by the authorities which hold that an action will lie against one who makes the use of a highway dangerous; and the cases of Graves *v.* Thomas, 95 Ind. 362; Beck *v.* Carter, 68 N. Y. 283, are not in point. The complaint does not aver that the fence was intentionally made dangerous for the purpose of injuring persons or animals that might trespass on the defendant's land. The cases which assert and extend the old doctrine, that spring-traps and guns shall not be set to catch trespassers, have no application, for here the negligence charged against the defendant is nothing more than the failure to exercise proper care in constructing and maintaining the fence. The cases of Hooker *v.* Miller, 37 Iowa, 613; Deane *v.* Clayton, 7 Taunt. 489, and similar cases, can exert no influence upon this investigation. The case of Henry *v.* Dennis, 93 Ind. 452, does not belong to the same class as the present, for in that case the poisonous substance which caused the injury was placed in the street. Here, the fence was on the defendant's own land, and the rule declared in the case cited cannot apply. The defendant did nothing to entice plaintiff's horse to leave the highway. If the defendant had purposely placed feed near the highway, and thus tempted animals wandering

along it to enter his inclosure, a different case would confront us; but here the land was covered with grass and herbage, the usual and natural growth of the season. Nature clothed the field with the grass, not the defendant.

At common law this action could not be maintained, because owners of animals are forbidden to allow them to run at large; but our statute changes this rule of the common law, and invests the board of county commissioners with authority to permit domestic animals to run at large. Welch *v.* Bowen, 103 Ind. 252. The complaint avers that the proper order had been made, so that in permitting the horse to wander upon the highway, the appellant was not guilty of any wrong. The order of the board permitting animals to run at large forms an important element in the case; not only as bearing upon the question of contributory negligence, but also as bearing upon the question of the appellee's negligence. It bears upon the latter question, because it made it the duty of the appellee to take notice that horses and cattle might wander upon the highway, and with this knowledge he had no right to do anything that was reasonably certain to cause injury to animals passing along the highway. Knowing, as he did, that animals might lawfully wander along the highway, he owed a duty to the community to use ordinary care to prevent any act of his from causing injury to animals wandering near his land.

"Enjoy your own property in such a manner as not to injure that of another person," is a maxim of the law that rules many cases, and we think it must rule the one at bar. The appellee had a right to select his own fence, but he had no right, under the circumstances stated in the complaint, to construct it so as to make it dangerous to animals passing along the highway, for in doing so he violated the maxim we have quoted. Suppose he had dug a deep trench along the line of the highway, and had covered it with planks so thin as to give way beneath the weight of the smallest domestic animal, would he not be liable to an owner of a

horse killed in attempting to cross the trench? Again, suppose that a landowner places posts along the line of his land, and attaches wires near the ground where they would be hidden by the grass or weeds, would he not be liable to the owner for the value of a horse caught in the wires and killed?

The case as made by the complaint is in principle the same as those we have given as illustrations. The landowner is not bound to maintain a secure fence, nor, indeed, any fence; but if he does undertake to maintain a fence along a highway, he must not negligently suffer it to become dangerous to passing animals. His duty is to exercise reasonable care to prevent his fence from becoming dangerous, but it extends no further. If the fence he elects to build is built as such fences are usually built, there is no liability; but if it is allowed to get out of repair, and thus become essentially dangerous, he may be liable. He is not under any duty to place boards on the top of a wire fence, or to do any like act, but he is bound to use care to keep the fence from becoming a trap to passing animals.

It is the duty of landowners to take notice of the natural propensity of domestic animals, and under the allegations of this complaint it was the duty of the appellee to take notice of the propensity of horses to seek the pasture within his inclosure, and join others of their kind feeding there. In view of the facts that the board of commissioners authorized animals to run at large, that the appellee was chargeable with notice of this order, that he was bound to know that it was probable that animals wandering on the highway would seek his pasture, and that the fence was so maintained along the highway as to be in effect a trap to passing animals, we think the complaint must be held sufficient. These are the controlling facts, and they make the complaint good. It is not the kind of fence selected, nor is it the absence of top planks or the like that influences our judgment; but what chiefly

influences it is this: the fence was so negligently maintained that, under the circumstances stated in the complaint, it was in effect a trap in which it was in a great degree probable that passing animals would be caught and injured. Had the fence, although composed of barbed wires, been constructed and maintained as ordinarily prudent husbandmen usually construct such fences, our conclusion would be altogether different, but the complaint very clearly avers that it was not so constructed or maintained. The appellant assumed all risk from fences, whatever their kind, contructed and maintained with ordinary care, but he did not assume risks from fences known to be intrinsically dangerous, constructed along the line of a public highway.

We regard the location of the dangerous fence immediately along the line of the highway as an important element in the case. The strong probability that the pasture within the inclosure, and the presence of other horses feeding there, would allure horses on the highway to enter it, rendered such a fence almost certain to injure passing animals. This fact, considered in conjunction with the other facts to which we have especially directed attention, brings the case fully within the reasoning of the court in Durham *v.* Musselman, 2 Blackf. 96, and directly within the decision in Young *v.* Harvey, 16 Ind. 314. In the former case it was said: "If the injury is the natural or probable consequence of the act, and such as any prudent man must have foreseen, it is but reasonable that the perpetrator of the act should be held accountable for the injurious consequences. As in the case of a man baiting his trap with flesh so near the highway or the grounds of another, that dogs passing the highway, or kept in the grounds of another, are attracted into his traps, and thereby injured, he is liable for the injury. Townsend *v.* Wathen, 9 East, 277. In the second place, when the injury is accidental, the liability of the actor must depend on the degree of probability there was that

such an event would be produced by the act." In Young *v.* Harvey, the horse of the plaintiff, wandering upon the streets and commons of a suburb of the city of Indianapolis, fell into an old well on the lot of the defendant, and it was held that an action would lie. This decision is strongly approved by a writer of excellent standing. 1 Thomp. Neg. 300. The case has been approved in many subsequent cases. Graves *v.* Thomas, 95 Ind. 361; Smith *v.* Thomas, 23 Ind. 69; Indianapolis, etc. Co. *v.* Wright, 22 Ind. 376; Howe *v.* Young, 16 Ind. 312. In Jones *v.* Nichols, 46 Ark. 207, 55 Amer. Rep. 575, the defendant left open an unguarded excavation some distance from the highway, and the plaintiff's cow, which had been turned out upon the commons, fell into the excavation, and it was held that the action would lie.

Our ultimate conclusion is that the facts stated in the complaint at least make a *prima facie* case, and that it is strong enough to drive the defendant to answer.

Judgment reversed.[1]

THE CHICAGO CITY RAILWAY CO. *v.* FRANK WILCOX.

Supreme Court of Illinois, 1891.

[*Reported in* 138 *Ill.* 370.]

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. Richard S. Tuthill, Judge, presiding.

Mr. C. M. Hardy, for the appellant:

Negligence is a question of law. Railroad Co. *v.* Haworth, 39 Ill. 353; Railway Co. *v.* Pennell, 94 id. 448.

Plaintiff shows that he exercised due care. Peoria *v.* Simpson, 110 Ill. 294; Railroad Co. *v.* Andres, 16 Bradw.

[1] See Wabash, St. L. & P. Ry. Co. *v.* Locke, 112 Ind. 404 (1887).

292; Mendota *v.* Fay, 1 id. 418; Kepperly *v.* Ramsden, 83 Ill. 354.

When the question of negligence is one of fact and not of law, its corollary, the question of prudence and due care, is one of fact and not of law. Myers *v.* Railroad Co., 113 Ill. 386; Coppner *v.* Pennsylvania Co., 12 Bradw. 600.

It is a question of fact, for the jury to determine from the evidence, whether a person receiving an injury from the alleged negligence of another, and who sues to recover therefor, has exercised proper care and caution on his part, and not one of law. It is not for the court to tell the jury, etc. Pennsylvania Co. *v.* Frana, 112 Ill. 398.

In instructions to the jury when negligence is the gist of the action, it is the duty of the court to define negligence and tell the jury what it is in law, and leave them to find the facts, and determine whether or not they support the charge under such definition. All inferences arising from the existence of facts proved should be drawn by the jury, and not by the court. James *v.* Johnson, 12 Bradw. 286.

That the question whether a child has been guilty of contributory negligence or not presents an issue of fact, has been repeatedly decided by this court. Chicago *v.* Keefe, 114 Ill. 222; Railroad Co. *v.* Murray, 62 id. 326; Railroad Co. *v.* Eininger, 114 id. 79; Railroad Co. *v.* Becker, 76 id. 32.

Mr. Charles E. Pope, for the appellee: —

The parent's contributory negligence does not cut off the child's claim for an injury. Cooley on Torts (2d ed.), 820, note 1; Bishop on Non-Contract Law, 583, note 1; Robinson *v.* Cone, 22 Vt. 213; Railway Co. *v.* Robinson, 127 Ill. 9.

When the damages go to the parents or next of kin, the negligence of the parents will bar a recovery. Railway Co. *v.* Grable, 88 Ill. 441; Chicago *v.* Hess, 83 id. 204; Bromley *v.* Goodwin, 95 id. 118; Tuttle *v.* Robinson, 78 id. 332.

If the parents were not guilty of negligence, as the child

was too young, in the sight of the law, to be negligent, the instruction is immaterial, and the only question that can arise is the question of the negligence of the defendant. Railroad Co. *v.* Welsh, 118 Ill. 575.

Certainly, the child himself showed a wisdom and discretion beyond his years in waiting for the south-bound train to pass. Coming, as he did, at the rear of this train, in a north-easterly direction, it was impossible for him to see the north-bound train. Hence, looking at the boy's conduct, as he is guiltless of negligence, the instruction complained of could not have misled the jury. If the child was in the exercise of ordinary care and prudence, the negligence of the parents was immaterial. Railway Co. *v.* Robinson, 127 Ill. 9.

As to whether negligence of an infant is a matter of law or a question of fact, see Railway Co. *v.* Robinson, 127 Ill. 10; Railroad Co. *v.* O'Connor, 119 id. 586; Railroad Co. *v.* Lane, 130 id. 116; Nagle *v.* Railroad Co., 88 Pa. St. 35; 1 Thompson on Negligence, 181; Railway Co. *v.* Grable, 88 Ill. 441; Bishop on Non-Contract Law, sec. 586; Railway Co. *v.* Ryan, 131 Ill. 474; Chicago *v.* Keefe, 114 id. 222; Railway Co *v.* Eininger, 114 id. 79; Beach on Negligence, sec. 39, note 2; Wharton on Negligence, sec. 309.

That negligence of parents cannot be imputed to infants, see Bishop on Non-Contract Law, secs. 581–583, 591; Wharton on Negligence, secs. 310–314; 1 Shearman & Redfield on Negligence, sec. 78; Beach on Negligence, secs. 40–45; Cooley on Torts (2d ed.), p. 818, and cases cited in notes to the text in these different works.

Mr. E. F. Masterson, also for the appellee.

Mr. Justice Bailey delivered the opinion of the court:

This was an action on the case, brought by Frank Wilcox, an infant, by his next friend, against the Chicago City Railway Company, to recover damages for a personal injury. The declaration alleges that, on the 24th day of June, 1887, the plaintiff was passing along Harmon Court, in the city

of Chicago, at its crossing over the defendant's railway on Wabash Avenue; that the defendant, by its servants, was then and there running on said railway a train of cars drawn by cables running underneath the surface of said avenue, and that while the plaintiff, with all due care, was passing along Harmon Court at said railway crossing, the defendant, by its servants, so carelessly and negligently managed and controlled said train of cars, without slackening the speed thereof or ringing a bell, that said train ran upon and struck the plaintiff with great force and violence, and so bruised and injured one of his legs as to render it necessary to amputate the same, thus rendering him a cripple for life. The defendant pleaded not guilty, and on trial the jury found a verdict for the plaintiff and assessed his damages at $15,000, and for that sum and costs the plaintiff had judgment. On appeal to the Appellate Court said judgment was affirmed, and by a further appeal the record is now brought to this court for review.

The plaintiff at the time he was injured was a child only six years of age, and was living with his father and step-mother on the south side of Harmon Court a few feet east of the corner of Wabash Avenue. The evidence tends to show that just before the time of his injury he was on the south-west corner of Wabash Avenue and Harmon Court, playing with two other boys, and that his step-mother had come out of her house and was standing on the corner on the opposite side of Wabash Avenue; that as she came out to the corner the plaintiff called to her and asked her if she wanted him, to which she replied: "No, you can stay there;" that an acquaintance of Mrs. Carroll's coming along, she conversed with her for a few minutes, and then turned to go back to her house, and as she did so, the plaintiff called out: "Mamma, wait, I am coming;" that she thereupon stopped and stood waiting for the plaintiff, and as she did so, she saw a train of cable cars approaching from the north and motioned to the plaintiff to wait until

it had passed, which he did; that as it passed, the plaintiff walked around the rear end of it, and was immediately struck by another train coming from the south, and received his injury.

The only material questions in the case open for consideration here, arise upon the third instruction given to the jury at the instance of the plaintiff, which was as follows: —

"The court instructs the jury for the plaintiff, that if they, from the evidence, believe that the parents are working people, and that the father was not present at the time of the accident, and that the mother was attending to her usual occupation in attending their little store on Harmon Court, in such event the law does not require that persons in their station of life shall keep constant watch over their children, nor can the want of such care be imputed to them as negligent conduct, nor can negligence be imputed to the child, on account of its age, he being seven years of age, or about that at that time."

This instruction incorrectly assumes that the plaintiff, at the time of his injury, was one year older than he really was. The trial was in November, 1888, and the evidence is that he was seven years of age the preceding June, which would make him but six years of age June 24, 1887, the date of his injury. But this erroneous assumption was more favorable to the defendant than the evidence warranted, and therefore affords the defendant no just ground of complaint.

The instruction also, while holding that under the facts supposed, the negligence of the plaintiff's parents cannot be imputed to him, seems to be based upon the tacit assumption that, under proper circumstances, the rule of imputed negligence might apply. This assumption, if erroneous, was not prejudicial to the defendant, as the defence is based upon the assertion of that rule, as well as the assumption that it should be applied under the facts in this case. The instruction then, so far as this

portion of it is concerned, is free from any valid objection which the defendant can urge, if it can be shown, either that under the facts supposed the negligence of the plaintiff's parents cannot be imputed to him, or that the doctrine of imputed negligence can have no application to a case of this character. We prefer to consider the latter of these two propositions, and the question then is, whether the negligence of the plaintiff's parents, even if such negligence is proved, can be imputed to the plaintiff so as to be available in support of the defence of contributory negligence.

Upon this question the decisions of the courts of the various States are very much in conflict. The leading case among those which hold that the negligence of a parent, custodian, or one in *loco parentis*, should be imputed to a child not capable of caring for his own safety, is Hartfield *v.* Roper, 21 Wend. 615, decided by the Supreme Court of New York in 1839. In that case the plaintiff, a child about two years old, was alone in a travelled portion of a highway some distance from any house. The defendant was driving a sleigh, and the child was run over by the horses and injured before the defendant or any of those in the sleigh saw him. The plaintiff having recovered a verdict, a new trial was granted on the grounds, first, that the evidence failed to show negligence on the part of the defendant, and, second, that negligence on the part of the plaintiff's parents was clearly shown. The court held that although the child, by reason of his tender age, was incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of his parents furnished the same answer to an action by the child as would the omission of such care by the plaintiff himself in an action by an adult. The reasoning of the court embodied in an elaborate opinion by Mr. Justice Cowen is, in substance, that the custody of the child was confided by law to its parents, that said child could not be exposed as it was in that case without gross negligence; that an adult injured by a collision could not

recover if he had contributed to the injury; that the same rule was applicable to children and could be enforced only by requiring care from those who have them in custody; that an infant is not *sui juris*, but belongs to his custodian; that the custodian is his agent and the custodian's neglect is therefore his neglect. The rule thus established has been adhered to, with slight modifications, by the courts of New York, and has also been adopted by the courts of several of the other States, and is usually known as the New York Rule.

What is known as the English rule is declared in Waite *v.* N. W. Ry. Co. 1 El. Bl. & El. 719. In that case the plaintiff, an infant about five years old, was in charge of his grandmother, who purchased tickets for both at a station with the intention of taking the train to another point on said line of railway. In crossing the track to reach a platform, they were run down by a train under circumstances of concurrent negligence on the part of the grandmother and the servants of the company. The grandmother was killed and the plaintiff seriously injured. The court, in holding that no recovery could be had, repudiated the idea that there was any relation between the plaintiff and his grandmother akin to that of principal and agent, but placed its decision upon the theory that he and she were identified the same as though he had been in her arms. The decision turned upon the legal identity between the infant plaintiff and his custodian, and did not go beyond that class of cases in which the parent or custodian is present and controlling the infant at the time of the injury.

In this country, in many of the States, the rule established by the case of Hartfield *v.* Roper has been seriously criticised and condemned. The leading case in which that rule is repudiated, and in which is established what has sometimes been called the Vermont rule, is Robinson *v.* Cone, 22 Vt. 213. In that case a boy, less than four years of age, was attending school in the country, and as he was

returning home, he was amusing himself by riding down hill on his sled. While engaged in this sport, as he was lying upon his breast on his sled with his legs hanging over the sled, he was run upon and injured by the two-horse sleigh of the defendant who was driving down hill on a smart trot. The court in its decision repudiated the doctrine of imputed negligence, and held that, although a child of tender years may be on the highway through the fault or negligence of his parents, yet, if he be injured through the negligence of the defendant, he is not precluded from obtaining his redress, all that is required of the infant plaintiff being, that he exercise care and prudence commensurate with his capacity.

The rule denying the doctrine of imputed negligence is now recognized and enforced by the courts of many of the States, and is supported by the reasoning and authority of text-writers whose opinions are justly entitled to a high degree of consideration. Among them may be mentioned Mr. Bishop, who in his recent treatise of Non-Contract Law, sec. 582, says: "This new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor or shiftless or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But, by the new doctrine, after a child has suffered damages, which, confessedly, are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any of the several defendants who may have contributed to them, he cannot have them if his father, grandmother or mother's maid happens to be the one making the contribution. In these and other respects, it is submitted, the established principles stated in a preceding section are conclusive of the proposition that the doctrine now in contem-

plation does not belong to the common law." See full discussion of the question of imputed negligence in case of injuries to children in Wharton on Negligence, sec. 314, *et seq.;* Beach on Contributory Negligence, secs. 38–48.

It seems to be assumed by several of the writers on the subject that this court is committed to the doctrine that in a suit by a child to recover damages caused by the negligence of the defendant, the negligence of the plaintiff's parents or custodians may be imputed to the plaintiff in support of the defence of contributory negligence. While there is in some of the cases some foundation for this assumption, yet, in our opinion, the question has never been so considered or determined by this court as to make it the settled rule in this State. Most of the cases to which reference is made as supporting said doctrine were suits brought by a parent in his own right or as the legal representative of the child, where the death of the child was alleged to have been caused by the negligence of the defendant. Such was the case in City of Chicago *v.* Major, 18 Ill. 349; City of Chicago *v.* Starr, 42 id. 174; C. & A. R. R. Co. *v.* Becker, 76 id. 25; Same case, 84 id. 483; Hund *v.* Geier, 72 id. 593; City of Chicago *v.* Hesing, 83 id. 204; and T. W. & W. Ry. Co. *v.* Grable, 88 id. 441. Where an action for the negligent injury of an infant is brought by a parent, or for the parent's own benefit, it is very justly held that the contributory negligence of such parent may be shown in bar of the action. That is only a phase of the general rule that the contributory negligence of the plaintiff is a defence. Beach on Contrib. Neg. sec. 44.

Of the remaining cases to which we are referred, in which the doctrine of imputed negligence has been discussed, the first is, A. B. R. R. Co. *v.* Grimes, 13 Ill. 585. In that case suit was brought by an adult to recover damages of the railroad company for killing a mare, and the case of Hartfield *v.* Roper is incidentally referred to in the opinion as indicating an exception to a general rule which the court had laid down in its decision, but there is nothing

indicating an approval or adoption of the rule there announced. In C. & A. R. R. Co. *v.* Gregory, 58 Ill. 229, suit was brought by a child not quite five years of age and the judgment in favor of the plaintiff was affirmed, the court holding that no negligence was shown either on the part of the plaintiff or his mother, and there was therefore no occasion for determining whether her negligence, if she had been negligent, would have been imputed to the plaintiff. In City of Chester *v.* Porter, 47 Ill. 66, suit was brought by a child about three years old to recover damages for injuries caused by his being run over by an ox-team and cart at work on the street. A judgment in favor of the plaintiff was reversed, this court holding that there was no evidence in the record of any negligence on the part of the defendant, and the fact that the plaintiff ought not to have been permitted to be on the street alone is alluded to only in the discussion of the want of evidence tending to charge the defendant with negligence. The defence of contributory negligence is not spoken of. In P., Ft. W. & C. R. R. Co. *v.* Bumstead, 48 Ill. 221, a judgment in favor of the plaintiff was affirmed, the court holding, so far as the defence based upon the alleged negligence of the plaintiff's parents was concerned, that no such negligence was proved, and there was therefore no occasion to either assert or discuss the doctrine of imputed negligence. In Gavin *v.* City of Chicago, 97 Ill. 66, the plaintiff brought suit for an injury alleged to have been caused by the negligence of the city authorities in improperly constructing or managing a swing bridge over the Chicago River. The defendant attempted to show negligence on the part of the plaintiff's mother in permitting him to be on the street in the vicinity of said bridge unattended. A judgment in favor of the defendant was affirmed, the court holding that there was no proof of negligence either on the part of the plaintiff's mother or of the city authorities.

It is apparent that in none of the cases above mentioned was there any occasion for the court to determine whether,

as a rule of law, the negligence of the plaintiff's parents or custodian would sustain the defence of contributory negligence, nor is there any attempt in any of them to consider or discuss the rule. In several of them language is used which would seem to imply a tacit recognition of the doctrine of imputed negligence, but in none of them was the adoption of that doctrine essential to the decision, nor can we suppose from the language used that the court intended to commit itself definitely to an affirmance of that doctrine.

The only remaining decision of this court on this question to which our attention has been called is that of O. & M. R. R. Co. *v.* Stratton, 78 Ill. 88. There the plaintiff, who at the time of his injury was ten years old, was travelling on the railroad in company with and in the immediate custody of his father. On arriving at their destination, both repaired to the platform of the car while it was yet in motion, the plaintiff taking his station on the lowest step of the platform and his father on the next step above and behind him, both having baggage in their hands. Both stepped off while the train was still moving quite rapidly, and the plaintiff, on striking the station platform was thrown by his momentum under the cars and severely injured. This court reversed a judgment in favor of the plaintiff, not for any error of law committed at the trial, but solely on the ground that it was against the evidence. In the opinion the conclusion was reached that the evidence failed to charge the defendant with negligence, and also that it showed that the plaintiff, or at least his father, was guilty of negligence in stepping off the train while in rapid motion. Clearly, if no negligence on the part of the defendant was shown there was no right of action, and whether the plaintiff or his father was negligent was wholly immaterial. A discussion of the doctrine of imputed negligence was unnecessary to a decision of the case.

The rule, however, was stated that, if the negligence of the plaintiff's father was the proximate cause of the plaintiff's injury, the defendant could, on no just principle, be

held liable. This was, no doubt, a recognition of the rule, which has been spoken of above as the English Rule, that where the parent is present and in the immediate control of the child, the parent's negligence may be imputed to the child. This court, however, cannot fairly be said to be committed to a doctrine upon the principle of *stare decisis*, by its recognition or assertion in a case which does not call for its application, and the decision of which rests wholly upon other grounds.

Not being concluded therefore by any of our former decisions, we are disposed to adopt the rule which seems to us to be most reasonable and most in conformity with the recognized principles of the common law, viz., that where a child of tender years is injured by the negligence of another, the negligence of his parents or others standing *in loco parentis* cannot be imputed to him so as to support the defence of contributory negligence to his suit for damages. So far then as this branch of the case now under consideration is concerned, the instruction given contained no error as to which the defendant has any just ground of complaint.

But it is further objected that said instruction is erroneous in holding, as a matter of law, that the plaintiff, who, at the time of his injury, was only six years of age, could not be charged with personal negligence which the jury could consider as tending to sustain said defence. The application of the doctrine of contributory negligence to the conduct of young children is a difficult one, and very naturally had led to a considerable difference of opinion. The two opposing views most commonly met with are, first, that up to a certain age, the precise limit of which is not and perhaps cannot be well defined, a child is incapable of such conduct as will constitute contributory negligence, and that the court may so declare as a matter of law. The rule thus contended for is sometimes said to be analogous to the rule of the common law which exempts children under seven years of age from criminal responsibility. It

has accordingly been held that children of eighteen months, of two years, of two years and ten months, of four years, under five years, of five years, of six years, under seven years, and even seven years of age, are incapable of such negligence. Bishop's Non Contract Law, sec. 586, and authorities cited. This rule seems to have been recognized in this State with more or less distinctness in the following cases: C. & A. R. R. Co. *v.* Becker, 84 Ill. 483; C. & A. R. R. Co. *v.* Gregory, 58 id. 226; City of Chicago *v.* Hesing, 83 id. 204; Gavin *v.* City of Chicago, 97 id. 66; T., W. & W. Ry. Co. *v.* Grable, 88 id. 441; Chi. W. D. Ry. Co. *v.* Ryan, 131 id. 474; C., St. L. & P. R. R. Co. *v.* Welsh, 118 id. 572.

The other view is, that young children are bound to use such care and such care only as is usually exercised by children of the same age and degree of intelligence, and that it is always therefore a question of fact to be determined by the jury whether, in a given case, the child is in the exercise of proper care, his tender years, his intelligence or the want of it, and all the circumstances by which he was surrounded being taken into account. Under this rule, as is claimed, it can never be laid down as a matter of law, that any child, however young, is incapable of contributory negligence, it being always a question of fact for the jury. The following cases are referred to as giving some support to this rule: C. & A. R. R. Co. *v.* Becker, 76 Ill. 25; C. & A. R. R. Co. *v.* Murray, 62 id. 326; Kerr *v.* Forgue, 54 id. 482; C., R. I. & P. Ry. Co. *v.* Eininger, 114 id. 79.

But as we are disposed to view the present case, it will be unnecessary for us to determine which of these two rules should be adopted, for even admitting that the rule last mentioned is the true one, we are of the opinion that there was no prejudicial error in said instruction. While we are not permitted to consider the evidence for the purpose of determining what is or is not proved, all questions of that character being conclusively settled by the judg-

ment of the Appellate Court, we may properly consider the evidence, and all inferences which may legitimately be drawn from it, for the purpose of determining the propriety of the rulings of the court in giving or in refusing instructions to the jury. If then it can be seen that an instruction given, though embodying an incorrect proposition of law, could not, in view of the evidence and of all inferences which may properly be drawn from it, have materially prejudiced the party complaining of it, the judgment will not on that account be reversed.

We are of the opinion that the evidence, when considered in connection with the fact that the plaintiff, at the time he was injured, was but six years old, does not warrant the inference that he was guilty of contributory negligence. His attention, just before he was injured, was attracted to the train of cable cars approaching from the north, and in obedience to his mother's direction, he waited until it had passed by, and he then attempted to cross the track in the rear of that train. He failed to notice another train coming from the opposite direction on the other track, and which at the time must have been on the other side of the train at which he was looking and in all probability hidden from his view. The two tracks are near together, and the instant the plaintiff passed the track on which the train was running south, he was struck by the train running in the opposite direction on the other track and injured.

The only negligence charged was in not seeing and thereby avoiding the train running north. There is no pretence that the plaintiff saw that train or that it was in any way brought to his attention before it struck him. If he had been an adult and capable of the observation, reason and reflection of a man of mature years, it would probably have been his duty to know and remember that a train might possibly be in motion on the other track, and to take such precautions as were reasonably necessary to assure himself that such was not the case before attempting to cross it.

But to expect such a course of reasoning and reflection of a child but six years old would be contrary to ordinary human experience. Doubtless a child as young as the plaintiff was, may possess to a very considerable degree what may be termed the instinct of self-preservation, and be in consequence capable of exercising very considerable care for his own safety. But when moved by that instinct he acts only in view of what he sees or what is actually present to his senses. To guard against an unseen danger, or one which has not come within the sphere of his observation, requires an exercise of reason and reflection of which so young a child is seldom capable, and for which the law, administered on humane principles, will scarcely hold him responsible.

The only theory, in view of the evidence, upon which the jury could have found the plaintiff guilty of negligence in attempting to pass in the rear of the train going south was, that it was his duty to observe that there was still another track to cross, and to reflect that there might be another train approaching on that track, and being warned of possible danger by such course of reasoning, to have then looked to see whether such other track was clear before attempting to cross it. Such course of conduct may well have befitted an adult, but is scarcely to be expected of a child six years old.

We are of the opinion that, if upon the evidence the jury had found specially that the plaintiff was guilty of contributory negligence, such finding could not have been sustained. Whether the instruction then was or was not correct in holding that, on account of the plaintiff's tender age, negligence could not be attributed to him, it manifestly did no harm, as the jury could not have found otherwise than they did on that question if the instruction had not been given, or if the contributory negligence of the plaintiff had been submitted to them as a question of fact.

We find no material error in the record, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.[1]

MR. JUSTICE WILKIN, dissenting.

INLAND AND SEABOARD COASTING CO. *v.* TOLSON.

Supreme Court of the United States, 1891.

[*Reported in* 139 *U. S.* 551.]

Error to the Supreme Court of the District of Columbia.

THE case is stated in the opinion.

Mr. Walter D. Davidge and *Mr. Nathaniel Wilson*, for plaintiffs in error.

[1] Compare Holton *v.* Daly, 106 Ill 131, 140–141 (1882).

On imputing parents' negligence to infants, see Hartfield *v.* Roper, 21 Wend. 615 (1839); Robinson *v.* Cone, 22 Vt. 213 (1850); Daley *v.* Norwich & Worcester Railroad Co., 26 Conn. 591 (1858); Bellefontaine & Indiana Railroad Co. *v.* Snyder, 18 Ohio St. 400 (1868); Cleveland, Columbus, Cincinnati & Indianapolis Railroad Co. *v.* Manson, 30 Ohio St. 451 (1876); Fitzgerald *v.* St. P., M. & M. Ry. Co., 29 Minn. 336 (1882); Huff *v.* Ames, 16 Neb. 139 (1884); Erie City Passenger Ry. Co. *v.* Schuster, 113 Pa. 412 (1886); Battishill *v.* Humphreys, 64 Mich. 494 (1887); Westbrook *v.* Mobile & Ohio Railroad Co., 66 Miss. 560 (1889); Wymore *v.* Mahaska County, 78 Iowa, 396 (1889); Winters *v.* Kansas City Cable Ry. Co., 99 Mo. 509 (1889); Newman *v.* Phillipsburgh Horse Car Co., 52 N. J. L. 446 (1890); Casey *v.* Smith, 152 Mass. 294 (1890); and notes in 55 Am. Dec. 677, 57 Am. Rep. 474, and 14 Am. St. Rep. 590.

On imputing carriers' negligence to passengers, see Robinson *v.* New York Central & H. R. Railroad Co., 66 N. Y. 11 (1876); Prideaux *v.* Mineral Point, 43 Wis. 513 (1878); Transfer Co. *v.* Kelly, 36 Ohio St. 86 (1880); Street Railway Co. *v.* Eadie, 43 Ohio St. 91 (1885); New York, L. E. & W. R. Co. *v.* Steinbrenner, 47 N. J. L. 161 (1885); Little *v.* Hackett, 116 U. S. 366 (1886); Follman *v.* Mankato, 35 Minn. 522 (1886); Philadelphia, W. & B. Ry. Co. *v.* Hogelandt, 66 Md. 149 (1886); The Bernina, 12 P. Div. 58 (1887); Mills *v.* Armstrong, 13 App. Cas. 1 (1888); Nesbit *v.* Town of Garner, 75 Iowa, 314 (1888); Dean *v.* Pennsylvania Railroad Co., 129 Pa. 514 (1889); Brickell *v.* N. Y., C. & H. R. Railroad Co., 120 N. Y. 290 (1890); Bunting *v.* Hogsett, 139 Pa. 363 (1891); B. & O. Ry. *v.* State, 29 Atl. R. 518 (Md. 1894); and notes in 23 Am. Rep. 4, 28 id. 565, 57 id. 488.

Mr. C. C. Cole and *Mr. A. A. Birney*, for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action brought March 11, 1884, by Tolson against the Inland and Seaboard Coasting Company to recover damages for the crushing of his foot by the negligent management of a steamboat of the defendant. The plaintiff recovered a verdict for $8,000, judgment on which was affirmed in general term. 6 Mackey, 39. The defendant sued out this writ of error.

At the trial it appeared that the plaintiff was the owner and wharfinger of a wharf in the Potomac River, known as Shamrock Pier, built on piles, in a suitable and substantial manner, early in 1883, and the front of which, twelve feet long, was parallel with the channel of the river, and had three heavy fender piles at each corner; that on September 15, 1883, the plaintiff, having a small basket of pears and an empty demijohn to put on board the defendant's steamboat for Washington, neglected to signal her as she came up the river, and hailed her as she was passing the wharf, whereupon she backed in to make a stern landing and struck the piles at the lower end of the wharf with considerable force; that at that time the weather was calm and the tide just turned flood, and neither the captain nor the pilot was in the pilot-house.

The plaintiff testified that while he was standing near the edge of the wharf by the capstan post, ready to catch a line to be thrown from the steamboat, she struck the wharf with such force as to start and break the plank flooring, and to catch and crush his foot between the planks and that post; and that at that moment the mate of the steamboat reached over and took the basket from his hand.

The defendant called as witnesses the pilot and others on board the steamboat, who testified that the plaintiff, as the steamboat neared the wharf, called out that there was

no need to throw a line, and leaned over and handed the basket and demijohn to the mate, and the mate gave the signal to go ahead, and he and the plaintiff shook hands and joked together, and the boat then struck the wharf and jammed the plaintiff's foot between the wharf and one of the fender piles; that the boat was then turned about and made a bow landing at the wharf for the purpose of rendering the plaintiff assistance, and the plaintiff was taken ashore, and then and there, in the presence of the mate and others, said "that he was hurt by his own fault, that he was standing in a dangerous position." The defendant also introduced evidence that the plaintiff the next morning, at his own house, explained to two of his neighbors how the accident happened, and said to them "that it was his own fault and nobody else's, that he did not blame any of the boat people," and stated the circumstances of the accident in the same way as the defendant's witnesses.

Upon the comparative weight to be given to the statements made by the plaintiff shortly after the injury, and to his testimony at the trial, the judge instructed the jury as follows: "It may at first seem surprising that a man who himself wears the shoe should not be able to tell where it pinches; that a man who has his foot crushed should not necessarily know better than any other party where it was hurt, and how it was hurt; and yet it is not an uncommon thing for other men who saw the thing done to be able to tell better than the man himself how the accident happened. The shock and pain may have the effect of rendering the man quite incapable of telling just exactly how the thing took place, so if you find the man at different times making somewhat different statements, it does not at all follow that it was his intention to mislead. You are, therefore, to look at any difference of statements that he may have made, if you believe he did make different statements, in that point of view. He may not be the best witness as to what did happen to himself, or the manner in which the thing may have happened."

The defendant excepted to this instruction, and contended that it invaded the province of the jury to determine the credit to be given to the plaintiff's various and contradictory statements, by directing them to look at the evidence in a particular point of view, and by treating the shock and pain of the injury as affecting not only his statements made the same evening, but also those made to his neighbors the next morning.

But the instruction, fairly construed, after calling the attention of the jury to two distinct considerations, — the one, the effect of the shock and pain (which could not have been understood to apply to statements made after the shock and pain had subsided), and the other, that the making of different statements at different times did not necessarily imply an intention to mislead, — suggested to the jury to look at any difference in the plaintiff's statements in that point of view. This was clearly within the judge's authority and discretion in aiding the jury to perform their duty.

The court gave the following instruction: "If the jury believe from the evidence that the wharf in question was an ordinarily strong and good one, and suitable for the purpose for which it was constructed, and that in making the landing in question the boat was thrown against the wharf with such force as to tear up some of the planks or boards of the flooring, this would be *prima facie* evidence of negligence on the part of the agents of defendant under the circumstances in making such landing, and would justify the jury in so finding, unless upon the whole evidence such *prima facie* evidence is rebutted." The defendant excepted to this instruction.

The court did not, in this or any other instruction, tell the jury that the burden of proof on the issue of the defendant's negligence was shifted upon the defendant. On the contrary, the jury were afterwards expressly instructed: "The plaintiff's whole ground of recovery is that the defendant was guilty of negligence. The burden of proof is

on the plaintiff to sustain this allegation." The whole effect of the instruction in question, as applied to the case before the jury, was that if the steamboat, on a calm day and in smooth water, was thrown with such force against a wharf properly built as to tear up some of the planks of the flooring, this would be *prima facie* evidence of negligence on the part of the defendant's agents in making the landing, unless upon the whole evidence in the case this *prima facie* evidence was rebutted. As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case was *prima facie*, and, if unexplained, sufficient evidence of negligence on their part, and the jury might properly be so instructed. Stokes *v.* Saltonstall, 13 Pet. 181; Transportation Co. *v.* Downer, 11 Wall. 129, 134; Railroad Co. *v.* Pollard, 22 Wall. 341; Le Barron *v.* East Boston Ferry, 11 Allen, 312, 317; Feital *v.* Middlesex Railroad, 109 Mass. 398; Rose *v.* Stephens & Condit Co., 11 Fed. Rep. 438.

In the same connection the jury were instructed as follows: "In determining whether the defendant's agents were guilty of negligence in making the landing in question, it would be proper for the jury to consider with the other facts and circumstances shown in evidence whether, under all the circumstances, it was dangerous to make a rear landing with that boat at that time at the wharf in question, and whether either the pilot or captain should not have been in the pilot-house during the making of said landing, and if they find from all the evidence that it was dangerous to make such landing under such circumstances, this will be *prima facie* evidence of negligence on the part of defendant to justify them in so finding, unless such evidence is rebutted by the whole evidence in the cause."

The exception to this instruction is equally unfounded. There can be no doubt that approaching a wharf with a steamboat in such a manner, and with such want of super-

vision as to be dangerous, is, of itself, evidence of negligence on the part of those in charge of her.

The court, at the defendant's own request, gave the following instructions to the jury: —

"If the jury find from the whole evidence that the injuries described in the plaintiff's declaration were caused by the negligence or carelessness of plaintiff, the plaintiff is not entitled to recover in this action, although they shall further find that in landing at or departing from the pier called Shamrock at the time described in the declaration, the defendant's boat was not managed by the defendant's servants with skill and care.

"If from the whole evidence the jury are unable to determine whether the injuries complained of in the plaintiff's declaration were caused by the negligence of plaintiff, or by the negligence of defendant's servants, the verdict of the jury must be for the defendant."

The court also instructed the jury as follows: "If you find the defendant was not guilty of negligence, that ends the case. If you find that the defendant was guilty of negligence, then a second point of inquiry arises, whether the plaintiff was also guilty of negligence, and whether his negligence contributed to the injury. If you find that the plaintiff was guilty of negligence, and that such negligence directly contributed to the injury, then it is not important to inquire how far such negligence contributed to it; for if he contributed to it at all, that would incapacitate the plaintiff from recovering."

The defendant requested the court to give this instruction: "If the jury shall find from the whole evidence that at the time the defendant's boat was landing at the pier Shamrock the plaintiff negligently or carelessly placed his left foot between the piles of said pier, or between the piles and the flooring of said pier, or between one of the piles in front of said pier and the flooring thereof, and allowed it to remain there while the boat was departing from said pier, and the foot so placed was injured while

in that position, then the plaintiff is not entitled to recover in this action."

The defendant also requested the court to give the same instruction modified by omitting the words "negligently or carelessly."

The court declined to do so, and gave the instruction with those words, and added: "This is upon the hypothesis that you shall first find the facts spoken of, and then that the plaintiff negligently or carelessly placed his foot in the position referred to. It, however, *still leaves with you the question, if you should find he did place his foot in such position, whether or not his act in doing that was such negligence as would disentitle him from recovering.* There is a principle which you will bear in mind in regard to that. It is this: That a person in the position of the plaintiff is to keep his wits about him, to be on the alert so as not to be injured, and to exercise such vigilance or care as is proportionate to the hazard of the duty in which he is engaged. For instance, a man should be more cautious if he is running a dangerous engine than if he is sitting, as you are now, in a position of safety, and attending to his usual avocation. His care must be in proportion to the hazard of his engagement. *There is no proof here to show that this was a dangerous vocation,* — standing there attending to that wharf, — and yet, nevertheless, there were certain hazards accompanying it, just as there are in almost all positions."

To the refusal to give the modified instruction requested, and to so much of the instruction as is above printed in italics, the defendant excepted.

The court rightly refused to omit the words "negligently or carelessly," as requested, because to do so would be to assume that the plaintiff's placing his foot between timbers of the wharf and keeping it there while the steamboat was leaving, was necessarily negligence as matter of law. The court truly said there was no proof in the case that "standing there attending to that wharf was a dangerous voca-

tion;" and properly submitted to the jury upon the whole evidence, the question whether the plaintiff exercised due care at the time and place of the injury, and under the circumstances attending it. The phrase, "such negligence as would disentitle him from recovering," was evidently used as synonymous with "such negligence as contributed to the injury."

Only two other instructions given by the judge and excepted to by the defendant require to be particularly noticed.

The one, "The burden of proof is, however, upon the defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury," was in accord with the uniform course of decision in this court. Railroad Co. *v.* Gladmon, 15 Wall. 401; Indianapolis & St. Louis Railroad *v.* Horst, 93 U. S. 291; Hough *v.* Railway Co., 100 U. S. 213; Northern Pacific Railroad *v.* Mares, 123 U. S. 710, 720, 721.

The other instruction was in these words: "There is another qualification of this rule of negligence which it is proper I should mention. Although the rule is that even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

The qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial. Radley *v.* London & Northwestern Railway, 1 App. Cas. 754; Scott *v.* Dublin & Wicklow Railway, 11 Irish Com. Law, 377; Austin *v.* New Jersey Steamboat Co., 43 N. Y. 75, 82; Lucas *v.* Taunton & New Bedford Railroad, 6 Gray, 64, 72; Northern

Central Railway *v.* Price, 29 Maryland, 420. See also Williamson *v.* Barrett, 13 How. 101, 109.

It was argued that this instruction was inapplicable, because there was no evidence that the defendant knew the peril of the plaintiff, or had either time or opportunity, by the exercise of any degree of care, to guard against it; that if his negligence consisted in standing in a dangerous position too near the edge of the wharf, the defendant was not bound to anticipate his remaining in that position; but that his negligence in fact consisted in placing his foot between the flooring and a fender pile, which the defendant could not have been aware of or guarded against.

It is true that the instruction could not apply, and therefore could not be understood by the jury to apply, to the latter alternative. But upon the question of the plaintiff's position and attitude, the evidence was conflicting; and it was indisputable that the steamboat was approaching the wharf at his call, and for the purpose of receiving freight from his hands, and that her pilot and officers saw him as he waited on the wharf. The jury might well be of opinion that while there was some negligence on his part in standing where, and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts, the defendant's negligence was the proximate, direct, and efficient cause of the injury.

Upon careful consideration of all the instructions given to the jury, we are of opinion that they were applicable to the evidence introduced; that they fully covered the instructions requested; and that they contained nothing of which the defendant has a right to complain.

A single question of evidence remains to be considered. A witness called by the defendant testified that he had had about twelve years' experience in navigating the Potomac River, as wheelman, first mate, second mate, pilot and

captain, but had never been at this wharf. He was asked "if, in his judgment, a position within two or three feet from the fender piles of a wharf constructed like the Shamrock Pier was a reasonably safe place for a wharfinger to stand when a boat was approaching in order to take off freight or to make a landing?" Objection was taken to this question by the plaintiff's counsel and sustained by the court, because the witness had not shown himself to be a wharfinger, and the defendant excepted.

The ground of the exclusion of the question appears to have been that the judge was not satisfied of the qualifications of the witness as an expert upon the subject inquired of. Whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive unless clearly erroneous as matter of law. Spring Co. *v.* Edgar, 99 U. S. 645; Stillwell & Bierce Co. *v.* Phelps. 130 U. S. 520; Montana Railway *v.* Warren, 137 U. S. 348. But in this case, independently of any such consideration, the question whether the place where the plaintiff stood on the wharf was reasonably safe, was one of the questions to be determined by the jury, depending on common knowledge and observation, and requiring no special training or experience to decide, and upon which therefore no opinions of witnesses were admissible. Milwaukee & St. Paul Railway *v.* Kellogg, 94 U. S. 469; White *v.* Ballou, 8 Allen, 408; Simmons *v.* New Bedford Steamboat Co., 97 Mass. 361.

Judgment affirmed.[1]

[1] See Davies *v.* Mann, 10 M. & W. 546 (1842), and an article by William Schofield, Esq., in 3 Harv. L. Rev. 263. See also notes in 8 Am. St. Rep. 813, 849, and 14 id. 188.

REGINALD E. DANIELS *v.* NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Supreme Judicial Court of Massachusetts, 1891.

[*Reported in* 154 *Mass.* 349.]

TORT, for personal injuries occasioned to the plaintiff, a child ten years and ten months old, while playing upon a turn-table connected with the defendant's railroad in Dedham.

At the trial in the Superior Court, before Mason, J., there was evidence tending to show that the turn-table was situated near the populous part of Dedham, and about one thousand feet from a public school located on an adjoining street, which the plaintiff attended; that the turn-table, as shown by a plan used at the trial, was upon the railroad location, and was distant between five hundred and six hundred feet from Dwight Street on the north, and about six hundred feet from Metcalf Street on the south, both of which crossed the railroad at grade, and about two hundred feet from Willow Street on the west, which ran parallel with the railroad tracks; that the turn-table was in plain sight of these streets, having large upright standards or guys twelve to fifteen feet in height, which could be seen for a considerable distance; that the Dedham station was situated on the line of the railroad about one thousand feet northeasterly from the turn-table beyond Dwight Street; that the defendant's road-bed, both beside and between the tracks, was used as a common thoroughfare from the grade crossing on Metcalf Street northerly towards the station, and had been so used for many years; that on April 24, 1888, the day of the accident, the turn-table was unlocked and unfastened, with no guards or notices thereon to prevent accident, except that it was provided with a bolt to keep it in place while locomotive engines were passing to and from it; that, when unlocked

and unfastened, it was capable of being turned around by children of the size and age of the plaintiff and his companions; that the bolt on the turn-table was attached to a lever moved by a handle, which was placed above the turn-table in plain sight, and this handle was easily and frequently moved by boys of the same size and age; that children had been in the habit of playing on the turn-table, and boys had been seen to turn it without being warned by the defendant's workmen employed about the turn-table; that in the afternoon of that day, after the close of school and shortly before the accident, the plaintiff with other boys went to the station to see a train come in; that they asked the train-men, who were switching cars on the tracks adjacent to the turn-table, to let them ride; that the train hands refused them permission to ride on the cars, and told them to stand off the track while the cars were being switched, but did not order them to leave the railroad or to keep off the turn-table; that the boys thereupon went to the turn-table and began to turn it around, and to ride thereon; and that, after riding around several times, the plaintiff's foot was caught, and he was injured.

Upon this evidence, the judge ruled that the plaintiff was not entitled to maintain the action, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. W. Burdett & C. A. Snow, for the plaintiff.

R. D. Weston-Smith, for the defendant.

LATHROP, J. The plaintiff does not contend that he had any express invitation from the defendant to enter upon its premises, but that he was enticed or allured by the attractiveness of the turn-table; and the proposition of law upon which he relies is, that if a railroad company leaves a turn-table unlocked or unguarded upon its own premises, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of

the turn-table, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was in fact attracted or allured by it; that, if so allured or attracted, the child comes upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser; and that the company owes to such child the duty to refrain from ordinary negligence with respect to the condition and management of its turn-table.

The turn-table is stated in the exceptions to have been five or six hundred feet from a highway crossing the railroad, and six hundred feet from another highway crossing. Shortly before the accident the plaintiff and some other boys were at a station on the railroad, which appears by a plan used at the trial to have been about 1,000 feet from the turn-table; that they then asked some train men, who were switching cars on the track adjacent to the turn-table, to let them ride on the cars, and, on being refused, went to the turn-table. The only thing stated in the exceptions to show that the turn-table was attractive is, that it had large upright standards or guys twelve to fifteen feet in height, which could be seen from a considerable distance.

The cases upon which the plaintiff relies may be divided into two classes. Those of the first class rest upon the proposition that if a turn-table is of a dangerous nature and character when unlocked or unguarded, in a place much resorted to by the public, and where children are wont to go and play, it is the duty of the railroad company owning the turn-table to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded. Stout *v.* Sioux City & Pacific Railroad, 2 Dillon, 294; s. c. nom. Railroad Co. *v.* Stout, 17 Wall. 657. The decision of the Supreme Court of the United States was apparently approved in Atchison & Nebraska Railroad *v.* Bailey, 11 Neb. 332; and followed in Evansich *v.* Gulf, Colorado & Santa Fé Railway, 57 Tex. 123; Houston & Texas Central

Railway *v.* Simpson, 60 Tex. 103; Gulf, Colorado & Santa Fé Railway *v.* Styron, 66 Tex. 421; and Gulf, Colorado & Santa Fé Railway *v.* McWhirter, 77 Tex. 356. See also Bridger *v.* Asheville & Spartanburg Railroad, 25 S. C. 24; Ferguson *v.* Columbus & Rome Railway, 75 Ga. 637, and 77 Ga. 102.

The second class of cases proceeds upon the doctrine of constructive invitation; that is, that if a person is allured or tempted by some act of a railroad company to enter upon its land, he is not a trespasser, and it is held that leaving a turn-table unguarded is such an act. Keffe *v.* Milwaukee & St. Paul Railway, 21 Minn. 207; O'Malley *v.* St. Paul, Minneapolis & Manitoba Railway, 43 Minn. 289; Kansas Central Railway *v.* Fitzsimmons, 22 Kan. 686; Nagel *v.* Missouri Pacific Railway, 75 Misso. 653.

The decision of the Supreme Court of the United States in Railroad Co. *v.* Stout rests upon the proposition stated by Mr. Justice Hunt, "that while a railway is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence, or from its tortious acts."

The cases cited in support of this proposition are Lynch *v.* Nurdin, 1 Q. B. 29; Birge *v.* Gardner, 19 Conn. 507; Daley *v.* Railroad Co., 26 Conn. 591, and Bird *v.* Holbrook, 4 Bing. 628.

With the exception of Daley *v.* Norwich & Worcester Railroad, all of these cases come within other rules, or within well-defined exceptions to the general rule, that a landowner owes no duty to a trespasser, except he must not wantonly or intentionally injure him or expose him to injury.

Lynch *v.* Nurdin, *ubi supra*, rests upon the doctrine that if a person unlawfully places an obstruction in a way, he is liable to a child who is injured thereby, although the child wrongfully meddles with the obstruction. The contrary,

however, was held in Hughes *v.* Macfie, 2 H. & C. 744, and in Mangan *v.* Atterton, L. R. 1 Ex. 239. In Lane *v.* Atlantic Works, 111 Mass. 136, the plaintiff was found to be without fault, and not a trespasser. See also, Clark *v.* Chambers, 3 Q. B. D. 327; Powell *v.* Deveney, 3 Cush. 300.

Birge *v.* Gardner, *ubi supra*, rests upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. To the same effect is Hydraulic Works Co. *v.* Orr, 83 Penn. St. 332.

Bird *v.* Holbrook, *ubi supra*, decides that a landowner cannot lawfully, without giving notice, set traps upon his own land for the purpose of injuring trespassers; and that if a person is injured by such a trap, he may recover. And in Connecticut the rule is held to be the same, though notice is given. Johnson *v.* Patterson, 14 Conn. 1. This, as pointed out by Morton, J., in Marble *v.* Ross, 124 Mass. 44, 49, proceeds upon the ground that the owner of land cannot wantonly injure a trespasser. The case of a trespasser injured by a vicious animal stands upon the same footing. Marble *v.* Ross, 124 Mass. 44.

The owner of land adjoining a public street is undoubtedly liable for an excavation made by him therein, if the land, with his consent, has for a long time been used by the public as a street. Larue *v.* Farren Hotel Co., 116 Mass. 67; Beck *v.* Carter, 68 N. Y. 283.

The case of Daley *v.* Norwich & Worcester Railroad, *ubi supra*, so far as it tends to support the result reached in Railroad Co. *v.* Stout, *ubi supra*, must be considered as overruled by Nolan *v.* New York, New Haven & Hartford Railroad, 53 Conn. 461.

The Court of Appeals of New York has stated, in a well-considered case, that it does not uphold the decision in Railroad Co. *v.* Stout, *ubi supra*, and although it seeks to distinguish that case from the one before it, the difference between the two cases is not very apparent. McAlpin *v.*

Powell, 70 N. Y. 126. In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived upon the platform of a fire escape, and fell through a trap-door therein which was insecurely fastened. The defendant was the landlord of the house, and it was his duty to keep the fire escape in order. It was held that he owed no duty to one who was using the fire escape for his own pleasure, and that the defendant was not liable.

In Frost *v.* Eastern Railroad, 64 N. H. 220, the plaintiff, a boy seven years of age, was injured while playing upon a turn-table of the defendant's railroad. The ground upon which he sought to recover was, that he was attracted to the turn-table by the noise of boys playing upon it. The turn-table was on the defendant's land, about sixty feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser, and that under the circumstances the defendant owed him no duty. The court expressly refused to follow the case of Railroad Co. *v.* Stout, *ubi supra*. On the question whether the defendant was liable on the ground of an implied invitation, Clark, J., in delivering the opinion of the court, said: "One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Subject to the exceptions we have before stated, and to some others which it is not necessary more particularly to refer to, an owner of land may use his land in such manner as he sees fit; and if a trespasser or mere licensee is injured, he cannot complain that if the owner had used it in a more careful manner no injury would have resulted. Hounsell *v.* Smyth, 7 C. B. N. S. 731, and cases cited; Clark *v.* Manchester, 62 N. H. 577; Klix *v.* Nieman, 68 Wis. 271; Gramlich *v.* Wurst, 86 Pa. St. 74; Cauley *v.* Pittsburgh, Cincinnati & St. Louis Railway, 95 Penn. St. 398; Gillespie *v.* McGowan, 100 Penn. St. 144; Hargreaves *v.* Deacon, 25 Mich. 1. See also Sweeney *v.* Old Colony & Newport Railroad, 10 Allen, 368; Metcalfe *v.* Cunard Steamship Co., 147 Mass. 66, and cases cited; Barstow *v.* Old Colony Railroad, 143 Mass. 535.

In Johnson *v.* Boston & Maine Railroad, 125 Mass. 75, the plaintiff bought a ticket of the defendant corporation which entitled her to be carried from Boston to Lawrence. She went as far as Somerville, a way station, and there left the cars and went to a house near by, intending to take a later train for Lawrence. After remaining at the house for a while, she returned to the station, and while crossing the tracks to the station of another railroad corporation, to meet her son, was injured. The space between the two stations was partly planked and partly filled in with earth, so as to form a convenient passage-way; and evidence was offered that a large number of passengers were in the habit of using this space as the plaintiff was using it, and that no notice or warning to the contrary had been posted. It was held that the evidence failed to show that the defendant held out any inducement to the plaintiff to enter its premises; that the use of the premises as a passage-way by strangers was a matter in which the defendant was absolutely passive, and from which nothing was to be inferred in favor of or in aid of the plaintiff; and that the plaintiff was a mere intruder, and could not recover. See also Wright *v.* Boston & Maine Railroad, 129 Mass. 440.

In Morrissey *v.* Eastern Railroad, 126 Mass. 377, a child four years of age was run over by the cars of a railroad corporation, while using the track as a playground. There was a footpath across the track which was used by persons, but in which the plaintiff had no rights, and by which he got upon the track. Evidence was offered that the defendant had been notified that the place was dangerous for children, and had been requested to place a fence across the path. The court held that the plaintiff was a mere trespasser upon the track; that no inducement or implied invitation had been held out to him; and that he could not recover. There was some evidence in this case that the engineer acted maliciously, or with gross and wilful carelessness; and this question was submitted to the jury, who found for the defendant.

In Wright *v.* Boston & Albany Railroad, 142 Mass. 296, there was a well-defined path leading to a railroad track, and an opening in a ridge near the track, and a passageway for the path through the ridge. There was no fence or obstruction to prevent persons from going on the track from the path, and when freight cars stood on the track an opening opposite the path was sometimes left. This path had been used by persons to cross the track, and no objection had been made by the defendant's servants to persons crossing there, except when cars were approaching. The plaintiff, a boy between six and seven years of age, was injured while going to school and crossing the track by the path. It was held that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to the plaintiff to use the path to cross the track.

The case of McEachern *v.* Boston & Maine Railroad, 150 Mass. 515, came up on a demurrer to the declaration, which alleged in substance that the defendant, a railroad corporation, left a car standing on one of several side tracks adjoining a public street; that the defendant knew that one of the doors of the car was insecurely fastened,

and was liable, upon receiving a slight touch, to fall to the ground; that the defendant well knew that said car "then was, and would be, an enticing, attractive, and inviting object to children, and well knowing that children then were, and long prior thereto had been accustomed to play in, upon, around, and about such cars as might happen from time to time to be placed upon any of said side tracks;" that the plaintiff, being then upwards of eleven years of age, was travelling upon the street in the vicinity of the side track upon which the car was standing, "and saw said car with its open door, and was thereby enticed and invited to look into said car, and thereupon did undertake to look into said car, exercising therein as much care as could reasonably be expected of a child of his years and capacity; and that in attempting to look into said car he carefully touched said door, and immediately said door fell upon him," and injured him. The demurrer was sustained, on the ground that the plaintiff was a trespasser, committing an unlawful act in meddling with the defendant's car; that he was not invited or enticed there by the defendant; and that the defendant owed him no duty to have the car safe for him to visit.

In McCarty *v.* Fitchburg Railroad, 154 Mass. 17, a child about five years old strayed from the yard of the house in which it lived on to a street, and thence into the freight-yard of a railroad corporation, where it was injured. The freight-yard was parallel with the street, and there was no fence between. It was held, in the absence of evidence that a fence was required by the Pub. Sts. c. 112, § 115, that it did not appear that there was any evidence of a breach of any duty which the defendant owed the plaintiff.

The cases which we have last cited are conclusive of the one at bar, whatever may be the rule elsewhere. The plaintiff was a mere trespasser upon the land of the defendant. We find no evidence of any invitation by the defendant or inducement held out to him to go there, and no evidence of a breach of any duty which it owed him.

The Superior Court rightly directed a verdict for the defendant.

Exceptions overruled.[1]

JOSEPH COIL BARRETT, BY HIS GUARDIAN, ETC., Respondent, *v.* SOUTHERN PACIFIC COMPANY, Appellant.

Supreme Court of California, Department Two, 1891.

[*Reported in* 91 *Cal.* 296.]

APPEAL from a judgment of the Superior Court of Orange County, and from an order denying a new trial.

The evidence showed that the family of the plaintiff's mother consisted only of herself and her children, and that she had been accustomed to send the plaintiff out to gather coal around the round-house and turn-table of the defendant, though he was not ordered to gather coal on the day of the injury, but had been directed to wait for her at a grocery store on the corner of the street opposite the turn-table. The second instruction, referred to in the opinion of the court, related to alleged contributory negligence on the part of the plaintiff's mother, and charged the jury, in substance, that for sustaining such defence they must find a want of ordinary care on her part as a parent, in respect to the cause of the injury; that her failure to use more than ordinary care in providing for the safety of her child would not defeat the action; that the burden of proof of her negligence was upon the defendant; that they might consider the evidence as to her condition and circumstances in determining the question as to her negligence; and that if she did not know, or have reason to know, or anticipate, or fear, the danger of the turn-table, she was not negligent in not providing against it. Further facts are stated in the opinion of the court.

[1] See note in 33 Cent. L. J. 325.

John D. Bicknell and *W. C. Belcher*, for appellant.[1]
Victor Montgomery and *Holloway & Kendrick*, for respondent.

De Haven, J. This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The plaintiff recovered a judgment for $8,500, and from this judgment, and an order denying its motion for a new trial, the defendant appeals.

It was shown upon the trial that defendant maintained a railroad turn-table upon its own premises in the town of Santa Ana. This table was about 150 yards from defendant's depot, and near its engine-house, and distant 72 feet from a public street. It was provided with a latch and slot, such as is in common use on such tables, to keep it from revolving, but it was not protected by any enclosure, nor did the defendant employ any person whose special duty it was to guard it. There were several families with small children residing within a quarter of a mile from the place of its location, and previous to the time when plaintiff was hurt, children had frequently played around and upon it, but, when observed by the servants of defendant, were never permitted to do so. At the date of plaintiff's injury he was eight years of age, and on that day he, with his younger brother, saw other boys playing with the turn-table, and giving them some oranges for the privilege of a ride, got upon it, and while it was being revolved, his leg was caught between the table and the rail upon the headblocks, and so severely injured that it had to be amputated. The defendant moved for a nonsuit, which motion was denied. This ruling of the court, and certain instructions given to the jury, present the questions which arise upon this appeal.

The appellant contends that it was not guilty of negligence

[1] The reporter's abstracts of the arguments of counsel are omitted.

in thus maintaining upon its own premises, for necessary use in conducting its business, the turn-table in question, and which was fastened in the usual and customary manner of fastening such tables; that the plaintiff was wrongfully upon its premises, and therefore a trespasser, to whom the defendant did not owe the duty of protection from the injury received; and that the court should have so declared, and nonsuited the plaintiff.

This view seems to be fully sustained by the case of Frost *v.* Eastern Railroad Co., decided by the Supreme Court of New Hampshire, 64 N. H. 220; 10 Am. St. Rep. 396. But in our judgment the rule, as broadly announced and applied in that case, cannot be maintained without a departure from well-settled principles. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible consistently with its proper use. This rule, which only imposes a just restriction upon the owner of property, seems not to have been given due consideration in the case referred to. But this principle as a standard of conduct is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection, a breach of duty, and in a legal sense constitutes negligence. Whether, in any given case, there has been such negligence upon the part of the owner of property, in the maintenance thereon of dangerous machinery, is a question of fact dependent upon the situation of the property and the attendant circumstances, because upon such facts will depend the degree of care which prudence would suggest as reasonably necessary to guard others against injury therefrom; "for negligence in a legal sense is no more than this: the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." Cooley on Torts, 630. The question of defendant's negligence in this case was a

matter to be decided by the jury, in view of all the evidence, and with reference to this general principle as to the duty of the defendant. If defendant ought reasonably to have anticipated that leaving this turn-table unguarded and exposed, an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing-ground for children.

In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and required to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which is ordinarily sufficient to enable those of more mature years to appreciate and avoid danger, and in proportion to this lack of judgment on their part, the care which must be observed towards them by others is increased. And it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defence.

The following are some of the cases in which this has been held: Railroad Co. *v.* Stout, 17 Wall. 657; Hydraulic Works *v.* Orr, 83 Pa. St. 335; Powers *v.* Harlow, 53 Mich. 507; 51 Am. Rep. 154; Nagle *v.* Mo. Pac. Ry. Co., 75 Mo. 653; 42 Am. Rep. 418; Koons *v.* Railway Co., 65 Mo. 592; Railway Co. *v.* Fitzsimmons, 22 Kan. 686; 21 Am. Rep. 203; O'Malley *v.* St. Paul, M. & N. Ry. Co., 43 Minn. 289; Whirley *v.* Whitman, 1 Head, 610. These cases, we think, lay down the true rule.

The fact that the turn-table was latched in the way such tables are usually fastened, or according to the usual custom of other railroads, although a matter which the jury had a right to consider in passing upon the question whether defendant exercised ordinary care in the way it maintained the table, was not of itself conclusive proof of the fact. Stout *v.* Railroad Co., 2 Dill. 294; O'Malley *v.* St. Paul, M. & N. Ry. Co., 43 Minn. 289.

Nor is the liability of the defendant affected by the fact that the table was set in motion by the negligent act of other boys. This is so held in some of the cases above cited, and the same principle was announced by this court in Pastene *v.* Adams, 49 Cal. 87, in which case it was held that a person who had negligently piled lumber, which had remained in that condition for a long time, was not exempt from damages sustained by one on whom it fell because the lumber was made to fall by the negligence of a stranger.

We see no error in the second instruction given at request of plaintiff. The portion to which exception was taken is not very well expressed, but we think, taken as a whole, the instruction states the law correctly.

Judgment and order affirmed.[1]

McFARLAND, J., and BEATTY, C. J., concurred.

CARRINGTON *v.* TAYLOR.

King's Bench, 1809.

[*Reported in* 11 *East*, 571.]

THIS was an action on the case in which the plaintiff declared, that whereas he before and at the time of the grievance after mentioned, and from thence hitherto hath

[1] See also Fort Worth & D. C. Ry. Co. *v.* Measles, 81 Tex. 474 (1892). For many authorities on duty to trespassers, see notes in 87 Am. Dec. 722; 26 Am. Rep. 562; 1 Am. St. Rep. 489; 15 id. 374. Compare Bush *v.* Brainard, 1 Cow. 78 (1823); Pouting *v.* Noakes [1894], 2 Q. B. 281.

been and still is lawfully possessed of and in a certain place prepared with suitable and proper conveniences for decoying, taking, and catching of wild fowl, commonly called a decoy, situate and being at the parish of Beaumont-cum-More in the county of Essex, and by means of such decoy during all the time aforesaid, until the committing of the grievance after mentioned, had been and was used and accustomed to decoy, take, and catch divers great quantities of wild fowl, to wit, wild ducks, mallards, teal, and widgeon, by reason whereof great profits and advantages had accrued, and still ought to accrue to him; yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the plaintiff, and to deprive him of a great part of the profits and advantages arising from his said decoy, afterwards and whilst the plaintiff was so as aforesaid possessed thereof on the 1st of January, 1809, and on divers days, etc., shot off and discharged divers guns and other engines, and made and caused to be made divers violent and loud noises so near to the said decoy of the plaintiff as thereby then and there greatly to disturb and frighten divers wild fowl then being at or near the said decoy; insomuch that divers wild fowl, to wit, 500 wild ducks, etc., then and there flew away and wholly quitted the said decoy, and divers other wild fowl, to wit, etc., which were then and there about to enter the said decoy were thereby then and there prevented from entering the same; and by means thereof the plaintiff was prevented from decoying, catching, and taking the said wild fowl in such plenty as he otherwise might and would have done, to wit at, etc., and thereby the plaintiff lost and was deprived of the profits, etc., which might and otherwise would have accrued to him from his said decoy, to wit, at, etc. Wherefore, etc.

At the trial of this case before the Lord C. B. Macdonald at Chelmsford, the plaintiff's right to the decoy, which was an ancient decoy, was proved; and it also appeared that the

defendant sought his livelihood in part by shooting wild fowl from his boat on the water, for which boat with small arms he had a license from the Admiralty for fishing and coasting along the shores of Essex; on one of the salt creeks of which county, called the Blackwater River, where the tide ebbs and flows, near Walton, the decoy in question was situated. The only proof of the disturbance by the defendant was, that he, being out in his boat shooting wild fowl in a part of the open creek, first fired his fowling-piece within about a quarter of a mile of the plaintiff's decoy, when 2 or 300 wild fowl came out; and afterwards approached nearer, and fired again at wild fowl on the wing at the distance of about 200 yards and upwards from the decoy pond, when he killed several widgeons, and immediately on the noise of the gun 4 or 500 wild fowl took flight from the pond; but it did not appear that he fired into the decoy. The learned judge left this as evidence to the jury of a wilful disturbance of the plaintiff's decoy by the defendant, for which this action would lie; and the jury found their verdict for the plaintiff with 40*s.* damages.

Garrow now moved to set aside the verdict, as being against law and evidence; the defendant having a right, he said, to shoot at the wild fowl in the place where he was, which was an open creek or arm of the sea, where the tide flowed and reflowed; and not having gone upon the plaintiff's land, nor fired into his decoy at the birds there.

The court however said, that they saw no ground for disturbing the verdict in point of law: and LE BLANC, J., referred to an old precedent of such an action, which had been followed by one or two others within his own remembrance on the Norfolk circuit. And the evidence they observed was proper to be left to the jury who had decided upon it.

Rule refused.[1]

[1] Compare Keeble *v.* Hickeringill, 11 East, 573, n. (*a*) (Trin. 5 Ann.).

ALDERSON *v.* T. WAISTELL AND H. WAISTELL.

Nisi Prius, 1844.

[*Reported in* 1 *C. & K.* 358.]

TRESPASS for an assault. — Pleas, 1st, by the defendant T. W., not guilty; 2nd, that the plaintiff first assaulted him, the said T. W., and that he made the assault complained of in self-defence; 3rd, that the defendant T. W. was possessed of certain sheep, which the plaintiff with a strong hand attempted to take and seize, and did take and seize, and convert to his own use, without the leave and license and against the will of the said defendant, and that the defendant assaulted the plaintiff in endeavoring to protect the said sheep; 4th, by the defendant H. W., not guilty.

The circumstances which gave rise to the alleged assault were the following: The plaintiff and the defendant T. W. were both in the habit of pasturing their sheep on a certain common; and, for the convenience of foddering such sheep, they had each erected "bields" on the common, towards which "bields" they were driving their sheep at the time the assault complained of was made. The plaintiff had two "bields," of one of which the defendant T. W., for some cause which did not appear, was desirous to get possession; and it appeared, that, in order that he might do so, he drove his sheep amongst those of the plaintiff. The latter endeavored to separate his sheep from those of T. W.; and it was proved that, whilst he was thus engaged, T. W. assaulted him. The evidence against the defendant H. W., who was the son of T. W., was that, whilst the sheep were intermingled, he threw a stick which struck the plaintiff. But it did not appear that he threw the stick with the intention of striking the plaintiff.

ROLFE, B., in summing up, observed: If you are satisfied that the defendant T. W. has made out either of his pleas, he will be entitled to your verdict; because, if the blow complained of was really and *bonâ fide* struck in order to prevent the plaintiff from getting away the defendant's sheep, that is a sufficient justification. With reference to the younger defendant, H. W., the only evidence is, that he threw a stick, which stick struck the plaintiff. But this is not sufficient, of itself, to constitute an assault; inasmuch as it does not appear for what purpose the stick was so thrown, and it is therefore fair to conclude, that it was in fact thrown for a proper purpose, and that the striking of the plaintiff was merely an accident.[1]

The jury found for the plaintiff on the first, second, and third pleas; and for the defendant H. W. on the fourth.

Knowles and *Cowling*, for the plaintiff.

Dundas and *Bliss*, for the defendants.

[Attorneys — *Jackson & H.*, and *Simpson.*]

SEELEY, Plaintiff in Error, *v.* PETERS, Defendant in Error.

Supreme Court of Illinois, 1848.

[*Reported in* 10 *Ill.* 130.]

Error to Peoria.

TRESPASS, originally brought before a justice of the peace of Peoria County by the defendant in error against the plaintiff in error, by whom a judgment for costs was rendered against the plaintiff. An appeal was taken to the Circuit Court, where the cause was tried before the Hon. John D. Caton and a jury at the May term, 1847, and a verdict and judgment rendered for the plaintiff for $4.10.

[1] Compare Wakeman *v.* Robinson, 1 Bing. 213 (1823); Bullock *v.* Babcock, 3 Wend. 391 (1829); James *v.* Campbell, 5 C. & P. 372 (1832); Peterson *v.* Haffner, 59 Ind. 130 (1877).

The material facts, and the instruction of the court excepted to, will be found in the opinion of this court.

T. Ford, for the plaintiff in error.

W. H. Herndon, for the defendant in error.

1. By the common law all persons were bound to keep up their own cattle; and if they went upon the grounds of others, the owners were liable in damages, unless the owners of the cattle could show that the lands trespassed upon should have been fenced, either by prescription, agreement, or assignment. Little *v.* Lathrop, 5 Greenl. 356; Wells *v.* Howell, 19 Johns. 385; Avery *v.* Maxwell, 4 N. Hamp. 36; Stafford *v.* Maxwell, 3 Hill's (N. Y.) R. 38; Lyman *v.* Gibson, 18 Pick. 423; Chambers *v.* Matthews, 3 Harr. (N. J.) R. 368; Bush *v.* Brainard, 1 Cowen, 79; Melody *v.* Reab, 4 Mass. 471; Rust *v.* Low, 6 do. 90; Holiday *v.* Marsh, 3 Wend. 142; Stackpole *v.* Healy, 16 Mass. 33; 3 Kent, 438–439.

2. We brought the common law with us from England and have adopted it by express statute. Rev. Stat. 337, § 1; 1 Kent, 472; 2 do. 28.

3. There the common law is the law of the land unless expressly repealed by legislative provisions, and the same is not repealed by implication or doubtful suspicion. Stafford *v.* Ingersoll, 3 Hill's (N. Y.) R. 38; Stackpole *v.* Healy, 16 Mass. 36; Melody *v.* Reab, 4 do. 471; 1 Kent, 464; 2 do. 28.

4. Now, have our statutes concerning enclosures and fences repealed the common law? They have not. They have only given a cumulative remedy. Rev. Stat. 280, 281, §§ 13–18; 3 Black. Com. 8, 9; 2 Tucker's Com. 5; Hooper *v.* Kittridge, 16 Verm. 677; Stafford *v.* Ingersoll, 3 Hill's (N. Y.) R. 38–41; Clark *v.* Brown, 18 Wend. 220.

5. Five States, viz., Massachusetts, New York, New Jersey, New Hampshire, and Maine, where they have similar statutes to our own, have all decided in most emphatic language that the insufficiency of fences is no defence for the defendant, unless in case of partition fences, and then only under some circumstances. Stackpole *v.* Healey, 11 Mass.

36; Little *v.* Lathrop, 5 Greenl. 356; Chambers *v.* Matthews, 3 N. J. 368; Stafford *v.* Ingersoll, 3 Hill's (N. Y.) R. 38; Avery *v.* Maxwell, 3 N. Hamp. 36.

6. If the construction of similar statutes by our sister States is regarded, weighed, and followed by this State, and they should be, the court below committed no error in giving the instructions asked for by plaintiff below, nor in refusing to give those asked for by defendant below. Campbell *v.* Quillan, 2 Scam. 288; Bond *v.* Appleton, 8 Mass. 472; Pennock & Sellers *v.* Dialogue, 2 Peters, 1; Stackpole *v.* Healy, 16 Mass. 36; Chambers *v.* Matthews, 3 Harr. (N. J.) R. 368; 3 Kent, 438.

O. Peters, upon the same side.

In this case the defendant insists that he is not required by law to fence against the cattle of others running at large, or in the highway; but that if the owner of cattle permits them to escape into another's enclosure, he is liable for any damage they may do; and that the condition of the fence is not a proper subject-matter of inquiry, except perhaps, as intimated in one of the instructions in this case, to regulate the amount of damages to be recovered.

To maintain this proposition, we insist:

1. That such was the rule of the common law;

2. That the common law, in this respect, has been adopted in this State; and

3. That this rule of the common law has not been repealed by any statute.

I. By the common law, one need not enclose his fields, but they were "bounded by the law;" the law was his fence. 18 Pick. 423; 4 Mass. 471; 15 Johns. 220; 3 Harr. 368; 3 Wend. 33; Salk. 335–336; 3 Hill, 38; 16 Pick. 33; 3 Black. Com. 210; 19 Johns. 385; Chitty, 90; F. N. Brev. 127–128, and Lord Hale's note to that case; 1 Cowen, 79, and note; Rust *v.* Low, 6 Mass. 90; 4 New Hamp. 36; Little *v.* Lathrop, 5 Greenl. 356; ib. 336; 3 Kent's Com. 438; Holliday *v.* Marsh, 3 Wend. 142; Wells *v.* Howell, 19 Johns. 384; Shepherd *v.* Huse, 12 Johns. 433; 2 Dane's

Abr. 658 to 680. Judge Dane, in this article on fences, has very fully discussed this rule of the common law, and collected the authorities.

II. This rule of the common law has been adopted in this State. Our statute (Rev. Stat. p. 337) adopts the common law, "so far as it is applicable and of a general nature." The act adopting this was passed February 4, 1819.

The rule of the common law, for which we contend, is of a "general nature;" and it is no less applicable than in numerous other cases, in which it is not doubted that we have adopted it; as in case of frauds, right of way, right of domicil. We shall show that it has been adopted in other — perhaps nearly or quite all of the other — States; and that too, under circumstances not essentially different from our own.

Indeed, it is not contended on the other side that this rule of the common law was not adopted here, but that it has been repealed by implication, by enactments of the legislature.

III. We will consider, then, whether this rule of the common law has been repealed by any enactments of the legislature.

And here it will be admitted that there has never been any act passed, directly repealing it; if it is repealed, it is by implication merely. A law is not to be deemed as repealed by implication, unless the repealing law establishes a new rule, contrary to, or inconsistent with, the existing law. The law does not favor repeals by implication, or unless it is clear that some evil is to be remedied. Bac. Abr.

Our statutes nowhere adopt any such rule to conflict with the common-law rule. This will be quite apparent by reference to the existing statute laws, and the history of legislation on this subject. All of our existing statute law in relation to fences is embraced in the new statutes. Rev. Stat. 51 *et seq.*

The first ten sections relate wholly to "common fields." As this was a species of tenure unknown to the common law, it became necessary to regulate it by enactments of the legislature. . A similar kind of tenures exists in most of the States, and hence we find most of the States legislating upon it in almost precisely the same manner. In England there was common of turbary, common of piscary, etc. But these were regulated by prescription, and were supposed to lie in grant.

While the first ten sections relate to "common fields" only, the eleventh, twelfth, thirteenth, and fourteenth sections relate wholly to partition or division fences. There can be no question as to the eleventh, twelfth, and thirteenth sections; the language is too explicit to admit of doubt. And when the fourteenth section is carefully considered, it will not less clearly relate to the same subject. The former sections provide for the appointment of fence-viewers, point out their duties, and define liabilities and obligations of adjacent owners of fields. The fourteenth section then provides, that nothing in the act shall debar owners from fencing as they please, with walls, etc., to be "subject to all provisions, inspections, and restrictions, to which, by that chapter, any other enclosure is made liable," etc. Now, no fences but partition fences are made subject to inspection, etc. This view is confirmed beyond a doubt, when it is considered that this fourteenth section was originally contained in a proviso to the Act of 1819, section three, and that act clearly related wholly to partition fences.

It is not quite so clear what was the exact meaning of the legislature in the three next sections, viz.: the 15th, 16th, and 17th; though it is not less clear that there is no manifest intention to repeal an important principle of the common law. It certainly adopts no rule inconsistent with, or contrary to, the common-law rule.

Sec. 15 declares a well-known rule of the common law, that the owner of a field shall have his action of trespass against the owner of cattle that break into his enclosure,

and no damage, his fence being good, etc., and then superadds a penalty of double damages for all subsequent similar injuries. It is not easy to see how this can be said to operate as a repeal. Sec. 16 provides that the "condition of the fence at the time the injury was committed may be proved on trial." What fence? Can it be any other than a partition fence? None other has been spoken of; and if there had, this section in no manner indicates that any such proof is to bar the action. It would have said so, if it had been so intended. It probably was intended to regulate the amount of damages by the condition of the fence, or perhaps to save from the penalty of double damages, if the fence was insufficient.

The part of this section authorizing three householders to view the fence does not show anything different from this. It, at most, points out a mode of making evidence for the parties, leaving the effect of the evidence to be determined according to law, but not to bar the action in any event. There is no indication of any such intention.

Section seventeen favors rather than opposes our construction. This prohibits the owner of land from injuring cattle which shall break into his enclosure through insufficiency, and provides for an arbitration, and [if] the amount awarded shall be paid, it shall bar any action for damages. These sections undoubtedly did intend to alter the common law in one respect, viz.: to authorize the person trespassed upon to distrain and impound the cattle at once, without waiting, as at common law, till the cattle were levant and couchant.

The three remaining sections (§§ 19, 20, and 21) concern only fences placed on lands of another by mistake, the mode of correcting the mistake, of running division lines, etc. Here, again, reference is clearly had to adjunct owners, and to partition fences. By what rule of construction is it, that we are to say that in one section the legislature meant division fences, and in another section another kind of fences, when there is no language used to indicate any such intention?

Section eighteen makes no reference to any kind of fence; "all cattle trespassing," etc. In such case the owner is to be notified; if he neglects to secure them the person trespassed upon may secure them, etc. So that if the owner of cattle, in any case, shall neglect to secure them, he is liable to have them seized. How would the legislature have provided thus, if they intended to repeal the common law, and make it necessary to fence against the open country and highways? But we have the aid of much authority on this question. In Massachusetts, by an act passed in 1785, ch. 52 (see Mass. Laws, vol. 1, p. 225), it was provided that four viewers should be elected, and for partition fences.

By their Act of 1788, ch. 65, § 3, it was enacted that a person injured in his tillage should have his action of trespass, he having a legal and sufficient fence. See, also, § 5 of same act. Sec. 3 of Mass. Act of 1788 is like § 16 of our Acts, ch. 51. The Mass. Acts were re-enacted in the State of Maine after the separation. The courts of both of those States have given judicial construction to those statutes, and have held that they did not repeal the common law. Rust *v.* Low, 6 Mass. R. 90; Little *v.* Lathrop, 5 Greenl. 356. Other States, where the history of their legislation is similar to our own, are not less explicit in determining that the common law is not repealed by implication. Avery *v.* Maxwell, 4 N. H. R. 36; Bush *v.* Brainard, 1 Cowen, 78, and a learned note to that case; 3 Harr. (N. J.) R. 368; 16 Mass. 36, before cited; 4 do. 473; 6 do. 90, 94; 3 Hill's Rep. 41. The history of the legislation on this subject, in this State, confirms the construction we contend for.

The two first laws relating to fences were passed on the 19th and 20th of February, 1819, a few days after the legislature had adopted the common law. The Act of February 19th provides:

§ 1. That all fields, etc., shall be enclosed with a fence of posts, etc.

§ 2. That if any mare, horse, etc., shall break into any

enclosure, the fence being of sufficient height and strength, etc., the owner shall be liable to make good all damages, for the first offence single damages, and ever after double damages.

§ 3. The only remaining section proceeds to regulate partition fences, and contains substantially the provisions of sections 11, 12, 13, and 14, of ch. 51, Rev. Stat.; the proviso of section 3 being the same as section 14.

In 1835 (Session Laws of 1835, p. 144, 505), the legislature repealed sections 1 and 2 of the Act of 1819, February 19, and at the same time re-enacted section 2, and enacted four other sections, which are literally the 15th, 16th, 17th, and 18th sections of ch. 51, of Rev. Stat., merely making the breaking of cattle through a sufficient fence penal, it could not possibly have been the intention to repeal the common law. If it should be said that the 15th, and subsequent sections of our Act use general language, broad enough to embrace all fences, the same, it is answered, is true, of the statutes of New York, Massachusetts, New Hampshire, Vermont, Maine, and New Jersey, all of which States have given to their statutes the same construction we contend for here. And it is not easy to see how this court can consistently adopt a different rule, without wholly disregarding settled rules of construing statutes, and all judicial precedents; not one judicial decision can be found against our construction, but numerous ones in favor of it.

All the arguments used in the argument of this case, as to the condition of the country, its sparse settlements, its waste lands, and the inconvenience of adopting our construction of our statute were pressed upon the courts in the cases referred to in other States, and yet the courts there adhered to the wholesome rule of the common law.

IV. There is one other question presented by this bill of exceptions, viz.: whether the owner of land is required to fence against a public highway.

The bill of exceptions shows that a highway runs along

part of the way by the *locus in quo;* thus attempting to draw the inference that the hogs escaped into the field from the highway. The plaintiff in error cannot object to this construction of his bill of exceptions. Then, were his hogs *lawfully* in the highway so as to require that defendant fence against them?

We say the legislature has no constitutional power to pass such a law.

Section eleven, article eight, of our Constitution declares that no man's property shall be taken for public use without compensation. Section one, of the same article, declares individual rights, etc.

The legislature cannot take my property and give it or its use to another.

In taking my land for a highway, it only takes an easement over it, i. e., the right of travel to accommodate the public, and it gains no right to say that A or B may take the soil, or herbage, and appropriate it to his own use. 4 New Hamp. 36; 16 Mass. 36; 3 Hill, 38; 3 Wend. 142; 7 New Hamp. 579.

It cannot certainly be contended that the legislature intended thus, by implication, by the exercise of doubtful constitutional power, to repeal a law, or to take away private rights. At least, before the court come to such a conclusion, it should see that such was clearly the intention, and not impute such conduct to the legislature, by at least a doubtful inference. Nor ought it to be inferred that the legislature has given license to depasture lands of another, and to impose onerous duties on the owners of fields, unless the language is most clear and unequivocal.

If the court should hold that the owner of land is required to fence, other consequences, the most disastrous, will ensue. If such shall be the rule, the owner will be subjected to an action for damages that may happen to cattle that shall break in and get damaged, as falling into wells, eating food that is poisonous or hurtful, etc. The duty to fence will imply a liability for not fencing effectually.

The opinion of the court was delivered by

TRUMBULL, J. This was an action of *trespass* to personal property, originally commenced by Peters against Seeley before a justice of the peace, and taken by appeal to the Circuit Court.

Upon the trial in the Circuit Court before a jury, Peters "proved that Seeley's hogs had damaged certain wheat in shock in a field belonging to him and closed." "The defendant (Seeley) then proved that the north side of said field, where the hogs got in, was so badly fenced that hogs which were not breachy could go in and out at pleasure, and that said fence was entirely insufficient to turn hogs. Further, that the north side of said field, where said defective fence was, was bounded by unoccupied and unenclosed prairie, and that a public road passed along said fence at least part of the way on the north side." At the instance of the plaintiff below, the court instructed the jury: "That if they believe, from the evidence, that the defendant's hogs went into the plaintiff's enclosure and did damage to his crops, they will find a verdict for the plaintiff, and assess his damages to amount of the injury actually done, and it matters not what was the condition of the plaintiff's fence, so far as his right to recover some damages is concerned, inasmuch as the owner of a field is not obliged to keep up a fence around his enclosure to keep out his neighbor's cattle or hogs, but the owners of cattle permit them to run at large at their peril." To the giving of which instructions, the defendant excepted. The jury found a verdict for the plaintiff below, upon which judgment was entered in his favor.

The errors assigned question the correctness of the instructions of the Circuit Court, which are admitted to have been proper, if the Common Law upon the subject of enclosures prevails in this State; and to determine whether it does, involves a construction of a part of the 51st chapter of the Revised Statutes, concerning "*Enclosures and*

Fences." In order to a more perfect understanding of that act, it may be well to advert to its history, for although now consolidated into one act in the Revised Statutes, it originally consisted of four distinct enactments, passed at different times.

On the 20th of July, 1819 (Laws, 1819–23), an act was passed regulating enclosures, the first section of which provided "that all fields and grounds kept for enclosure, shall be well enclosed with a fence composed of sufficient posts and rails, posts and palings, palisadoes, or rails alone, laid up in the manner called a worm fence, which posts shall be deep set and strongly fastened in the earth; and all fences composed of posts and rails, posts and palings, or palisadoes, shall be at least five feet in height; and all fences composed of rails, in manner which is commonly denominated a worm fence, shall be at least five feet six inches in height, the uppermost rail of each and every point thereof supported by strong stakes, strongly set and fastened in the earth so as to compose what is commonly called staking and ridering, otherwise the uppermost rail of every panel of such worm fence shall be braced with two strong rails, poles, or stakes, locking each corner or angle thereof," etc. This section further provides, that the apertures between the rails or palings shall not exceed a certain number of inches, and for the worm of worm fences. The second section provides, that the owner of any animal that shall break into any person's enclosure, the fence being of the height and strength specified in the first section, and found and approved to be such by the view of two persons for that purpose appointed by the County Commissioners, shall be liable to make good all damages to the owner of the enclosure; for the first offence, single damages only; and ever afterwards, double the damages sustained. The balance of this act relates to partition fences. On the 23d of February, 1819, another act was passed (Laws, 1819–37), regulating the enclosing and cultivating of common fields. These acts were in force in the Indiana Territory as early as 1807,

and before the Territory of Illinois was organized, and they are retained in the Revised Laws of 1833.

In 1835, January 27 (Gales' Statutes, 278), an act was passed to amend the Act of 1819, "*regulating enclosures.*" The first section of this act provides as follows: "That if any horse, mare, gelding, colt, mule, or ass, sheep, lamb, goat, kid, bull, cow, heifer, steer, or calf, or any hog, shoat, or pig, shall break into any person's enclosure, the fence being good and sufficient, the owner of such animal or animals shall be liable in an action of trespass, to make good all damages to the owner or occupier of the enclosure, for the first offence, single damages only, and ever afterwards, double the damages sustained."

The 2d section provides that the condition of the fence at the time the trespass was committed, may be proven upon trial, and also for summoning three householders to view the fence, whose testimony shall be good evidence touching the sufficiency thereof.

Section three makes the person injuring animals breaking through, for want of a sufficient fence, liable for such injury.

Section four requires notice to be given to the owners of animals trespassing (if known), and if they refuse to secure them, authorizes the person trespassed upon to secure and feed them, for which they are to receive a compensation from the owner; and section five repeals the 1st and 2d sections of the act to which it is an amendment.

In the Revised Statutes of 1845, the three foregoing acts, and an act providing for the removal of fences made by mistake on the lands of other persons, constitute but one chapter, the 15th, 16th, 17th, and 18th sections of which are the same as the first four of the Act of 1835, and the balance of the chapter is made up of the other three acts above referred to, omitting the first two sections of the Act of the 20th of February, 1819, which had been repealed by the Act of 1835.

It is insisted on the part of the defendant in error, that

the foregoing statutes create no obligation upon the owner of land to enclose it with a fence, if he would protect it against the depredations of cattle or hogs, and to support this view of the case, numerous authorities have been cited to show, —

First, That, by the common law, one need not enclose his fields with a fence, and that inasmuch as the common law has been adopted in this State, "so far as the same is applicable and of a general nature," that therefore this rule of the common law prevails in Illinois; and

Secondly, That similar statutes to those of Illinois have uniformly been held in other States not to change the rule of the common law.

Admitting that at the common law, the owner of a close was not bound to fence against the adjoining close, except by force of prescription, yet in adopting the common law, as was said in the case of Boyer *v.* Sweet, 3 Scam. 121, "it must be understood only in cases where that law is applicable to the habits and condition of our society, and in harmony with the genius, spirit, and objects of our institutions." See also Penny *v.* Little, 3 Scam. 301. However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill adapted to a new country like ours. If this common-law rule prevails now, it must have prevailed from the time of the earliest settlements in the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, they brought with them and adopted as applicable to their condition a rule of law requiring each one to fence up his cattle; that they designed the millions of fertile acres stretched out before them to go ungrazed, except as each purchaser from government was able to enclose his part with a fence? This State is unlike any other of the Eastern States in their early settlement, because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced, and their luxuriant

growth sufficient for thousands of cattle must be suffered to rot and decay where it grows, unless the settlers upon their borders are permitted to turn their cattle upon them.

Perhaps there is no principle of the common law so inapplicable to the condition of our country and people as the one which is sought to be enforced now for the first time since the settlement of the State. It has been the custom in Illinois so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large. Settlers have located themselves contiguous to prairies for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon unenclosed ground is universally conceded. No man has questioned this right, although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages on account of the insufficiency of the fences through which their stock have broken, and never till now has the common-law rule, that the owner of cattle is bound to fence them up, been suffered to prevail or to be applicable to our condition. The universal understanding of all classes of the community, upon which they have acted by enclosing their crops and letting their cattle run at large, is entitled to no little consideration in determining what the law is, and we should feel inclined to hold, independent of any statutes upon the subject, on account of the inapplicability of the common-law rule to the condition and circumstances of our people, that it does not and never has prevailed in Illinois. But it is unnecessary to assume that ground in this case. The legislature upon this subject from the time when we were a part of the Indiana Territory down to the last law contained in the Revised Statutes, clearly shows that the legislature never supposed that this rule of common law prevailed in Illinois, or intended that it should. The first and second sections of the Acts of 1807 and 1819, which are incorporated into the Revised Laws of 1833, expressly required *all fields kept for enclosures to be well enclosed with a fence*, and

subjected the owner of cattle breaking through such fence as the law required to the payment of damages. Now although those two sections were repealed by the Act of 1835, yet the same provisions were substantially re-enacted, except that what should constitute a sufficient fence was left to be determined upon the trial instead of being prescribed by law. Why these provisions, if the owner of cattle coming upon the lands of another was liable in any event, whether the latter had a fence or not? What did the law mean, by requiring all fields kept for enclosures to be well fenced? It has been argued that these provisions, and section 15 of chapter 51, Revised Statutes, were declaratory of the common law. But the common law required no fences, how then could an act making a fence requisite be declaratory of it? Would the legislature be guilty of doing so absurd a thing as to solemnly declare that the owner of cattle breaking into an enclosure, *the fence being good and sufficient*, should be liable to damages, provide for summoning viewers to examine the fence, and leave its condition to be proved upon trial, when he would be liable at all events even though there was no fence? There are numerous other legislative acts clearly manifesting the understanding of the legislature, that cattle were permitted to run at large, and that the owners of fields were bound to fence against them. The eighteenth chapter of the Revised Statutes prohibits, under a penalty, the planting of castor beans without securing "the same with as good and sufficient a fence as is generally put up and used for the protection of grain crops in the neighborhood." The 35th chapter subjects drovers to a penalty who drive off any cattle, hogs, etc., of any citizen, either from his own premises, or "from the range in which the stock of any such citizen usually run." The sixth section of the thirty-ninth chapter prevents the taking up and posting "any head of neat cattle, sheep, hog, or goat, between the month of April and the first day of November, unless the same may be found in the lawful fence or enclosure of the taker up, having broken in the same."

The third section of the forty-ninth chapter requires the person having possession of the horse of another under certain circumstances, "to turn the same out." Would the law direct an animal to be turned out where it had no right to run? Why all these various provisions and many others like them, if animals have no right to run at large?

It is manifest that the legislature has all along acted upon the presumption that horses, cattle, hogs, etc., might lawfully be at large; the people have always so understood the law, and if there ever was a case where contemporaneous construction and acquiescence could be properly resorted to for the purpose of ascertaining the law, this is surely that case, both as regards the right of stock to run at large, and the necessity for fencing against them.

But we are told that precisely similar statutes have been enacted in other States, upon which their courts have put a construction which is obligatory upon this court. An examination, however, of the legislation in other States referred to, does not warrant the conclusion assumed by counsel. Some of the statutes and cases construing them most relied upon, of which Massachusetts furnishes the strongest case, will be referred to.

By the third section of the statute of Massachusetts of 1788, ch. 65, it was enacted: "That any person injured in his tillage, mowing, or other lands under improvement, that are enclosed with a legal and sufficient fence, whether such improved land be in common or general field, or in a close by itself, by swine, sheep, horses, or neat cattle, may have and maintain an action of trespass," etc. In the case of Rust *v.* Low, 6 Mass. 90, the court held that the provisions of this section were merely in affirmance of the common law, and in assigning the reasons for so holding, the court say: "By this section a man injured in his close which is sufficiently fenced, by sheep, swine, horses, or neat cattle, may have his action against the owner. . . . But it cannot be supposed that when goats, asses, or mules trespass upon his land, which is sufficiently fenced, that all remedy is

taken away;" and as a further reason for their decision the court refer to a subsequent section of the same act, which gave the party his remedy in certain cases where his fence was insufficient. These reasons cannot apply in construing the fifteenth section of our act, because there is no such omission as occurs in the Massachusetts statute, nor is there any subsequent section of the character therein referred to.

The case of Rust *v.* Low is the foundation of that of Little *v.* Lathrop, 5 Greenl. 356, and several other cases to which reference has been made; but as the first case is based upon a statute different from ours, and cannot, therefore, be regarded as an authority in the construction of our act, the cases founded upon it can have no greater weight. It is, however, insisted on the part of the defendant in error, that the fifteenth and three subsequent sections of the statute have reference only to partition fences, and in support of this proposition, reference is made to 3 Harrison, 368, 4 New Hamp. 36, 5 Greenl. 356, and some other authorities, to show that where a section of the statutes of those respective States had declared generally what should constitute a lawful fence, the courts of those States, construing the whole act together, had limited the language so as to make it apply to partition fences only.

It would swell this opinion to an unreasonable length, were the various enactments of all these States to be compared with ours, and the distinctions between them pointed out. But whatever may be the construction of their statutes in the States where they were enacted, there can be little doubt, when we look into the legislation of our own State, that the fifteenth section was intended to apply to all enclosures. The first section of the Act of 1819 most clearly applied to all fences. Its language is general, and we have seen no similar provision in any other State. The Act of 1835, now constituting four sections of chapter fifty-one of the Revised Statutes, had no connection, when originally passed, with any other acts, either in reference to

division fences or enclosures of common fields; and the fact that in the revision of the laws it has been incorporated into the same chapter with other acts in reference to fences, cannot, nor was it ever intended that it should, alter its meaning. If the fifteenth section stood in an act by itself, would any one think of restricting its language, which is general and applies as much to one sort of fences as another, to division fences? We cannot see the propriety of restricting the general language of the fifteenth section to one class of fences more than another. By this section, a remedy is given to a party whose enclosure is broken into, "*the fence being good and sufficient;*" and it necessarily follows, that unless the fence be good and sufficient no action lies, no matter whether that fence be a division fence, a fence against the highway, or against the unentered land of government. The legislature has not restricted the provisions of this section to partition fences, and we do not feel at liberty or inclined to do so.

The cases which have been referred to, to show that in several of the States cattle cannot lawfully be upon the highways, and that the owner of land is not bound to fence against cattle not lawfully upon the adjoining close, have no application here, for two reasons: first, because, as has been shown, in this State a man, to be entitled to maintain an action for the trespass of cattle upon his close, must have it surrounded by a good and sufficient fence; and secondly, we have no general law in this State prohibiting cattle from running upon the highways, but, on the contrary, as has been shown, cattle in this State are permitted to go at large.

In the case of Studwell *v.* Rich, 14 Conn. 292, the court, after stating the English law which requires every man to keep his cattle upon his own lands, say: "Such is not the law of Connecticut," and they quote from Swift, who says: "The owners of land are obliged to enclose them with a lawful fence, or they can maintain no action for a trespass done thereon by cattle." "This law" (the court continues)

"naturally grows out of the situation of the country at the time of the first settlement of the State. It was more convenient for our ancestors to enclose their cultivated fields than their pastures. The cattle were suffered to roam over the unenclosed land, and obtain a subsistence wherever they could."

It is true the court in Connecticut base their decision upon the statutes of that State, but it is equally true that there was no statute directly repealing the common-law rule upon this subject. In South Carolina, by the common law of that State, a similar doctrine prevails to that in Connecticut. Fripp *v.* Hasell, 1 Strob. 173.

An objection has been made to the constitutionality of a law by which one man's cattle are permitted to enter upon and consume the grass growing upon the land of another without compensation. We can see no force in this objection. The legislature certainly has the right to regulate the means for enjoying property. It can hardly be insisted that if a man will not make use of the ordinary means to preserve his property, that the public is bound to preserve it for him, or else pay the losses which his own carelessness may have occasioned.

Since the decision in the 5th of Greenleaf, the law has been changed in Maine so that the owners of land are bound to fence against cattle, and in the case of Gooch *v.* Stephenson, 13 Maine (1 Shepley) R. 371, this very point of the constitutionality of the law was raised and thus disposed of by the court: "If cattle lawfully on adjoining lands stray where they might not go, they may be driven off. Or the owner of land may exclude the cattle of others by sufficient fences, and if these are violated, he may seize and impound cattle doing damage, or maintain trespass against their owner. . . . Lands in this country cannot be profitably cultivated, if at all, without good and sufficient fences. To encourage their erection, it is undoubtedly competent for the legislature to give, to the owners of land thus secured, additional remedies and immunities. We perceive nothing in

the law which violates or impairs the Constitution." Being, therefore, of opinion, that the rule of the common law requiring the owner of cattle, hogs, etc., to keep them upon his own ground does not prevail in Illinois, and that the tenant of land in this State is bound to fence against cattle, it follows that the instruction of the Circuit Court was erroneous and its judgment is therefore reversed, and the cause remanded for further proceedings.

The following dissenting opinion was delivered by

CATON, J. Differing, as I do, from the opinion of the majority of the court, propriety and justice to myself, as one of its members, require that I should assign the reasons which have forced me to the opinion which I entertain. If the influence of this decision might not be felt beyond the case, or even this question, I might let it pass in silence; but the rules of construction which are adopted, not only in construing our statute by which the common law of England is adopted here, but the statutes relating to this particular subject, are such that I can give them no sanction by my silence, for I think if they become the settled doctrine of the court, they will lead to alarming consequences. It is admitted, on all hands, that by the common law of England, every man was bound to keep his beasts within his own close, under the penalty of answering in damages for all injury arising for their being abroad, and that the owner of land was not bound to protect his premises from the intrusion of a stranger or his animals. By the first section of the sixty-first chapter of the Revised Statutes, it is provided that, "the common law of England, so far as the same is applicable, and of a general nature, and all statutes and acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First" (excepting three specified statutes), "and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force, until repealed by legislative authority." Let us first inquire whether this admitted

principle of the common law was adopted by this statute, for this is questioned by those who disagree with me. That it is "of a general nature" is too clear to require argument, and its exclusion, if sustained at all, must be upon the ground that it is not applicable. What did the legislature mean by the use of the word "applicable"? Applicable to the nature of our political institutions, and to the genius of our republican forms of government, and to our Constitution, or to our domestic habits, our wants, and our necessities? I think I must ever be of opinion, that nothing but the former was meant, and that to adopt the latter is a clear usurpation of legislative power by the courts. If we adopt the former, but little difficulty will ever be experienced in applying the rule, and the question propounded will always be of a legal character, for legal rules will always determine whether any given portion of the common law is consistent with, or hostile to, the genius of a republic or the principles of our Constitution. By this principle, the rule by which any portion of the common law is excluded, or adopted, will apply with equal force all over the State. If we adopt the latter, then we are driven to examine, not a question of law and principle, but of convenience and policy. By this latter rule, we might have to hold a principle of the common law in force in some portions of the State and not in others; for in some places it might be well adapted to the genius, and customs, the wants and expectations of the people, while it would be the very reverse in others. We should have to investigate and decide upon facts, without any legal mode of trying them, and not law. If we say that we will not enforce a principle of the common law, because, in our judgment, a different rule would be better for the general good, or more just in principle, or more conformable to the habits and ways of the people, then it seems to me that we are legislating, and I know not where we should stop in this course of judicial legislation. If the courts may say that this rule, or that, of the common law, is not law, because a different rule would be more just, or would suit the

people better, then they must assume that their judgments are infallible, and there is no longer any occasion for a legislature to alter the common law, for the courts will happily make all needful alterations. The very statement of such a proposition, in plain terms, is too startling to find an advocate, and too dangerous to admit of defence, and yet it seems to me that we are rapidly verging to that alarming position, if we are not already there.

For the purpose of proving that this principle of the common law is but illy adapted to a country like ours, and hence not applicable, several assumptions are made, some of which are mere matters of opinion, about which men may well differ, while others originate in a misapprehension of facts. Whether it would be better for each one to take care of his own stock, and allow these "extended prairies," capable of producing grain sufficient to feed a nation, to be reduced to a state of cultivation, without the owner's expense and great delay of fencing them, where timber is scarce, would be but matter of opinion, which the people's representatives are much more capable of forming than we are. I think it quite as probable that the settlers located on the borders of the prairies that they might cultivate farms without the expense and delay of clearing off a heavy growth of timber, as that their moving object was to obtain a range for their cattle. Notwithstanding the privilege which it is said they have always enjoyed, not one part in a thousand of this luxuriant growth of grass but has rotted and decayed where it grew, or more generally been consumed by fire. So it will ever be, for the want of those thousands of cattle to crop it, until brought into cultivation by the husbandman's plough. One acre in tillage is of more value than many acres of wild grass, which would seem to show that as a question of political economy, it were better to allow the land to be cultivated without the expense of enclosing it, to keep off strangers' animals, than to impose so onerous a tax upon the tillage of the soil, for the sake of the small value of grass consumed by cattle. Again, it is said,

by intelligent men, to be capable of demonstration that one fourth the expense required to enclose the cultivated lands and meadows in the State would suffice to make pastures for all our stock. If so, it would show that this principle of the common law is not so inapplicable to the condition of our country and people. At least, so long as the court might be mistaken in its notions of convenience, it demonstrates the propriety of leaving that question to the legislature, where it properly belongs.

This principle of the common law is most unquestionably the law of natural justice, whence it originated, for it secures to each one the quiet enjoyment of his own, without intrusion or molestation from another. There is another principle of the common law which, in fact, expresses this in more general terms, and it is this: You shall so use your own as not to injure another. Is this maxim to be repudiated because it is not applicable to the genius of our people, and their customs and habits? The decision of this case would seem to say so. It is not for the benefit of the tiller of the soil that the fence is made, for his crops will grow as well without it; but it is for the benefit of the owner of the animals, that he may be relieved from restraining their natural propensities. I have no more natural right to compel my neighbor to protect his crops against my swine, than I have his orchard against my children or myself. It cannot be successfully denied that this alteration of the common law is imposing a burden upon one for the benefit of another, which should never be done, at least without his consent, by himself or his representative. Again, it is assumed that it has ever been the custom in this State for the settlers to allow their stock to run at large. If this were so, it would not change the common law, for that can only be done by legislative authority. But the proposition is by no means universally true, in point of fact. It is within my personal knowledge that in many portions of the State, and I think it is almost universally so in the prairie settlements, it has never been

the custom to allow swine and sheep to go at large, or to fence against them, and now, under this decision, all their crops may be destroyed with impunity. Again, it is said that "no man has ever questioned this right to let stock run at large;" and that "never till now has the common-law rule been supposed to prevail, or to be applicable to our condition." Here, again, the assumption is not supported by the facts. I have been for about sixteen years constantly engaged in the courts in this State, and this is the first decision that I have ever known on this subject where the common-law rule has not been held to apply, although the question has often arisen, and been as often decided, and so universal has been the acquiescence of the bar and the people that this is the first case where the question has been brought up for review. I might, at least with equal propriety, say of such acquiescence that it "is entitled to no little consideration in determining what the law is." It more properly, however, serves to show how unsafe it is for us to depart from the well-settled rules of the common law, upon our own notions of its propriety, or convenience, or applicability, or upon what we believe to be the understanding of the community. Our powers and duties are not representative, nor is a position to be held to be law, because the people have generally understood or wished it to be so, but the court must still look to other lights to find out what the law really is. When the principle becomes established, that the courts shall construe the law as the people understand it, then will a Cleon be justified in taking an appeal from the decision of the judge upon the bench to the multitude in the Court-House yard. . . . If we start out with the principle of making our decisions conform to public opinion, and, for a justification, say that the genius of our people and their customs and habits demand it, we shall soon end in making our notions of their wants and interests, rather than the common law, or the express statute, the rule of determination, and as at no time will the public opinion alone be the alleged ground of decision, that too may

be soon disregarded, and we shall be left to our own arbitrary notions of what is best adapted to the public good. That would be an usurped, and a despotic power.[1]

Judgment reversed.[2]

THE NEW YORK AND WASHINGTON PRINTING TELEGRAPH COMPANY *v.* DRYBURG.

Supreme Court of Pennsylvania, 1860.

[*Reported in* 35 *Pa.* 298.]

ERROR to the District Court of Philadelphia.

This was an action on the case by Andrew Dryburg against the New York and Washington Printing Telegraph Company, for carelessly, erroneously, and untruly transmitting to him a message from Robert Le Roy in New York.

On the 26th November, 1855, Robert Le Roy, a resident of New York, went to the office of the defendants, and left with their clerk the following message, to be transmitted to the plaintiff, who was a florist in Philadelphia: —

"NEW YORK, 26th November, 1855.

"To A. Dryburg, S. W. cor. 19th and Race:

"Send me, for Wednesday evening, two hand bouquets, very handsome, one of five, and one of ten dollars.

"ROBERT LE ROY,
"8 West 22d St."

[1] The remainder of the dissenting opinion, as given in the original report, deals chiefly with the cases and statutes cited in the opinion of the court.

[2] Compare Studwell *v.* Ritch, 14 Conn. 293 (1841); Knight *v.* Abert, 6 Pa. 472 (1847); C. & M. Railroad Co. *v.* Patchin, 16 Ill. 198 (1854); Kerwhaker *v.* C. C. & C. Railroad Co., 3 Ohio St. 172 (1854); Waters *v.* Moss, 12 Cal. 535 (1859); Comerford *v.* Dupuy, 17 Cal. 310 (1861); Buford *v.* Hontz, 133 U. S. 320 (1890). See Holmes' Common Law, 10.

And see Wam. St. Cas. §§ 47, 53–54, 67–68, 74, 82–97, 107.

In the message, as received in Philadelphia, the words "two hand bouquets," read "two hundred bouquets;" and was so delivered to the plaintiff. On the same day, Mr. Dryburg inquired of Mr. Le Roy, by telegraph, "Are the two hundred bouquets intended for pyramids; are the five and ten dollar for the table or hand?" To this he received the following reply, on the same evening: "I wrote simply two hand bouquets, and not two hundred; I want two bouquets for the hand, — one at five, and the other at ten dollars."

The original message was received from Mr. Le Roy, by the company, for transmission, upon the following terms and conditions: —

"To provide against mistakes in the transmission of messages, every message of consequence ought to be repeated, by being sent back from the office at which it is to be received, to the office from which it is originally sent. Double the usual price for transmission will be charged, when a message is so repeated, and a report made, by special messenger, to the party sending the same, whether it has been received by the party to whom it was sent, and if not, why not. Or fifty per cent. in addition to the usual rates will be charged, for either repeating or reporting only.

"The company will not be liable for any loss or damage that may ensue, by reason of any delay or mistakes in the transmission or delivery, or from non-delivery of unrepeated messages, but only engage to use reasonable efforts to secure the services of competent and reliable employees, so as to have their business transacted in good faith.

"Nor will the company be responsible for mistakes in the transmission, nor delay in the transmission or delivery, nor for non-transmission or non-delivery of any repeated message, to any extent beyond ten dollars, unless it be insured."

Neither of the messages was required to be repeated, nor insured or paid for as such. The plaintiff, between the

time of the receipt of the first and second messages from Le Roy, cut and procured a large quantity of expensive flowers for the purpose of making a number of bouquets, and brought this action for the damages alleged to have been thereby sustained.

The defendants alleged that the word "hand" was written "hund" in the original message, and proved that the person who transmitted it was a skilful operator.

The jury, under the instruction of the court, found a verdict for the plaintiff for $100, subject to the opinion of the court upon the following point reserved, to wit, "whether upon the whole of the evidence the plaintiff is entitled to recover?" The court *in banc* subsequently gave judgment for the plaintiff upon the reserved point, and the following opinion was delivered by SHARSWOOD, P. J.: —

"Mr. Le Roy of New York transmitted, in the usual way, by the defendants' line, a message to the plaintiff, a florist, for two hand bouquets. By the negligence of the defendants, as the jury have found, the message received by the plaintiff was an order for 200 bouquets; in consequence of which the plaintiff suffers damages. The point reserved was, whether the plaintiff could recover in this, which was an action on the case.

"As to the private notice of defendants, that they only insured the correct transmission of messages where they are repeated back, and paid for as such, we do not think it applies here, for many reasons. It was not brought to the knowledge of the plaintiff, and if it had been, could not have exempted the defendants from liability for actual negligence. It was not here the improper working of the telegraph wire, or the misunderstanding by the receiving officer of the signs used, which might be corrected by repeating back the message. But the error was in the clerk who transmitted the order, — he negligently read the word 'hand' as though it was 'hundred.' It is evident, then, that if the message had been repeated back, it would

have been reported all right. What the company, defendants, insure against, when they do insure, is not the negligence of their officers, but those delays and mistakes in the transmission which are unavoidable.

"On the main question we have had considerable difficulty. If the defendants are to be considered as the agents of Mr. Le Roy, it seems clear, that they are not liable to an action by the plaintiff. Unless the agent or servant commits some actual trespass, his constituent or master is alone responsible to the party injured by his negligence. This is the well-known rule, which is shortly expressed by the term *respondeat superior*. Lane *v.* Cotton, 12 Mod. 488; Colvin *v.* Holbrook, 2 Comst. R. 129; Denny *v.* The Manhattan Company, 2 Denio, 118.

"But how can the defendants be considered as the agents or servants of Mr. Le Roy, in a proper sense? To constitute them such, he ought to have had some control over them in the transmission of his message. He should, at least, have had a right to be present to oversee that his business was properly done, so as not to subject him to responsibilities to strangers, if not the right to take it in hand and do it himself. A man employed to make a coat for another cannot subject his employer to an action by a third person, for the consequences of negligence. One who contracts to build a house, or ship, or carriage for another, is in no case his servant. This was the position of the defendants. They contracted with Mr. Le Roy to deliver a certain message. To the plaintiff both the defendants and Mr. Le Roy are principals. If he is injured by the negligence of either of them, his recourse is to the party guilty of the negligence, and to him only. These responsibilities — independent of contract — and resting upon no privity between the parties, are incurred to strangers. The most striking illustration is that of a nuisance or obstruction of a public way, by which an individual incurs special damage; and in regard to real estate, perhaps, the suffering it to be in a noisome or dangerous condition by

the proprietor after notice, without regard to the original contract. Rule dismissed, and judgment for plaintiff."

To this opinion the defendants excepted; and having removed the cause to this court, they here assigned the same for error.

W. S. Price, for the plaintiff in error. The plaintiff was not entitled to maintain his action without averring and proving a wrongful motive or intent on the part of the defendants towards him. Livingston *v.* Cox, 6 Barr, 360; Wilt *v.* Welsh, 6 Watts, 10; Bokee *v.* Walker, 2 Harris, 139; Stewart *v.* Southard, 17 Ohio, 402; Bank of Rome *v.* Mott, 17 Wend. 554; Weckerly *v.* Geyer, 11 S. & R. 35.

The company was but the agent of Le Roy to transmit the message or order for him to the plaintiff, and is therefore answerable to Le Roy only. Camp *v.* Western Union Telegraph Company, 6 Am. L. R. 443, 734. Unless the agent or servant commit some actual trespass, his constituent or master is alone responsible to a party injured by his negligence. Story on Agency, § 308; Lane *v.* Cotton, 12 Mod. 488; Savage *v.* Walthew, 11 Id. 135; Colvin *v.* Holbrook, 2 Comst. 129; Denny *v.* The Manhattan Company, 2 Denio, 118.

The company did not assume to perform their special agency at all events. They did not insure that the message should be accurately communicated to their office in Philadelphia. McAndrew *v.* The Electric Telegraph Company, 33 Eng. L. & Eq. R. 180; Camp *v.* Western Union Telegraph Company, 6 Am. L. R. 444, 735.

Guillou, for the defendant in error. It was the duty of the company to transmit proper messages, for the usual and customary compensation. This is a duty growing out of their employment, and altogether independent of the contract with the party employing them. Bretherton *v.* Wood, 3 Brod. & Bing. 54; s. c. 9 Price 408; New Jersey Steam Navigation Company *v.* Merchants' Bank, Big. 351, 6 How. 382; 1 Smith's Lead. Cas. 169; Philadelphia and

Reading Railroad Company *v.* Derby, 14 How. 468; Shiells *v.* Blackburne, 1 H. Bl. 161.

The opinion of the court was delivered by

WOODWARD, J. The Telegraph Company did not send Le Roy's message as he wrote it. If written as the company's agent read it, the word "hand" was written "hund;" and if the company had sent the word "hund" to Dryburg, they would have been in no fault. Their agent, however, assumed that hundred was meant, and accordingly added the three letters, r e d, which did all the mischief. We do not understand that there was any dot after the letters "hund," to indicate a contraction; so that the agent's inference that "hundred" was the word meant was entirely gratuitous.

The wrong, then, of which the plaintiff complains, consisted in sending him a different message from that which they had contracted with Le Roy to send. That it was a wrong, is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like carriers, insurers for the safe delivery of what is intrusted to them, their obligations, as far as they reach, spring from the same sources, — the public nature of their employment, and the contract under which the particular duty is assumed. One of the plainest of their obligations is, to transmit the very message prescribed. To follow copy, an imperative law of the printing office, is equally applicable to the telegraph office.

But, when they violate this duty, whether negligently or wilfully, are they responsible to the party to whom the erroneous message is addressed? That is the exact question upon this record. That the defendants would be responsible to Le Roy, and that he would be responsible over to Dryburg, are not contested, though, perhaps, not conceded points; but that the company are liable to Dryburg, is resisted on several grounds.

In the first place, it is said, that the case belongs to that

class of torts in which malice is the gist of the action. This is a mistake. The *narr.* lays the duty to transmit the message as it was received, and assigns, as the breach, that it was transmitted "erroneously, untruly, and carelessly." No malicious intent is alleged, nor was it necessary that one should be alleged or proved. It is enough that negligence is charged and proved. It is settled, upon abundant authority, that incorporated companies may be sued in their corporate character, for damages arising from neglect of duty, and for trover. 1 Chitty's Pl. 68; Turnpike Company *v.* Rutter, 4 S. & R. 6; Fowle *v.* Common Council of Alexandria, 3 Peters, 409; Bushel *v.* Insurance Company, 15 S. & R. 173. And a corporation is liable in tort for the tortious act of its agent, though the appointment of the agent be not under seal, if the act be done in the ordinary service. Smith *v.* Birmingham Gas-Light Company, 1 Adol. & Ellis, 526.

Apart, however, from corporation law, it is said, in the next place, that, upon the general principles of agency, the company can be held answerable to Le Roy only. That the relation of principal and agent existed between him and the company, there can be no doubt; but I do not think it equally clear, that that relation was not established between Dryburg and the company. Telegraph companies are, in some sort, public institutions, open alike to all; and are largely used in conducting the commerce of the country. The banks decline to act upon their authority, and doubtless individuals may also decline; but when a man receives a message at the hands of the agent of such a company, and does act upon it, especially if, as Dryburg did, he use the same medium for responding to the message, it seems reasonable that, for all purposes of liability, the telegraph company shall be considered as much the agent of him who receives, as of him who sends, the message. In point of fact, the fee is often paid on delivery; and I am inclined to think, the company ought to be regarded as the common agent of the parties at either end of the wire.

But, however this may be, regarding the company as alone the agent of the sender of the message, is it to be doubted, that an agent is liable for misfeasance, even to third parties? For non-feasance, I agree, the agent is responsible only to his employer, because there is no privity of consideration betwixt the agent and a third party. The remedy in such cases must be sought in the maxim *respondeat superior;* but, even to this rule, there is an exception in the instance of masters of ships, who, although they are the agents or servants of the owners, are also, in many respects, deemed to be responsible as principals to third persons, not only for their own negligences and nonfeasances, but for those of subordinate officers and others employed under them. The general rule, however, was laid down by Lord Holt in Lane *v.* Sir Robert Cotton, 12 Mod. R. 488, in these words: "A servant or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance, an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrongdoer." s. c. 1 Ld. Raym. 646. The compilers have taken the rule from this source, and the cases cited by them show that it has generally been followed. See Paley on Agency, p. 396 *et seq.*, and Story on Agency, §§ 308, 309, 314, and 315, and the cases in notes.

The case of Camp *v.* The Western Union Telegraph Company, 6 Am. Law Register, 443, does not affect this principle, as we apply it here, for there the action was by the sender of the message, and it appeared, that the message was sent subject to the express condition, that defendant would not be liable for mistakes arising from any cause, unless the message was repeated by being sent back. This company had such a rule also; but they charge fifty per cent. advance upon the usual price of transmission, where the sender demands that the message be repeated back to the first operator, and Le Roy did not pay it. If it be granted that, in consequence of his not purchasing this

security against mistakes, he could not hold the company liable, it does not follow that Dryburg cannot. He did not know whether the message had been repeated back to Le Roy or not. He received it as the company delivered it to him, and it is very material to observe, that the mistake was not due to what has been called the infirmities of telegraphing, but to the improper liberties which the operator took with the text before him. The magic power which presides over the wires performed its duty faithfully, and bore the very message it was bidden to bear, but the human agent sent a different message from that which he was commanded to send. This is the misfeasance the plaintiff complains of.

The company claimed that their operator was a skilful and careful one. Then his negligence in this instance was the more apparent and inexcusable. If the handwriting was so bad that he could not read it correctly, he should not have undertaken to transmit it; but, the business of transmission assumed, it was very plainly his duty to send what was written. It was no affair of his, that the message would have been insensible. Messages are often sent along the wires that are unintelligible to the operator. When he presumed to translate the handwriting, and to add letters which confessedly were not in it, he made the company responsible to Dryburg for the damages that resulted from his wrongdoing.

We do not conceive it necessary to go any farther in the discussion of this case. There are several errors assigned to which we have not specifically alluded, but we see nothing in them to require a reversal of the judgment.

Judgment affirmed.

DICKSON AND OTHERS *v.* REUTER'S TELEGRAM COMPANY LIMITED.

Court of Appeal, 1877.

[*Reported in* 3 *C. P. Div.* 1.]

APPEAL from the judgment of the Common Pleas Division in favor of the defendants on demurrer to the statement of claim which alleged that the plaintiffs were merchants at Valparaiso, and were a branch house of the firm of Dickson, Robinson, & Co., of Liverpool; the defendants were a telegraph company, having their chief offices in London, and agencies in Liverpool and in various parts of the world, including South America. The defendants had a system of forwarding in one "packed" telegram the messages of several senders, each message being distinguished and headed by a registered cipher known to the defendants and their agents, and also to the senders, which messages, on receipt of the packed telegrams by the defendants' agents, were transmitted to the proper recipients. Previous to December, 1874, Dickson, Robinson, & Co., were in the habit of sending messages to the plaintiffs through the defendants' company, and were instructed by the defendants to head the messages by a registered cipher word indicating that the messages were intended for the plaintiffs. On the 26th of December, 1874, the plaintiffs received at Valparaiso a telegraphic message, which they understood, and reasonably understood, to be a direction from Dickson, Robinson, & Co. to ship barley to England; but the message was not in fact intended for the plaintiffs. The misdelivery was caused by the negligence of the defendants or their agents. On receiving the telegram the plaintiffs proceeded to execute the supposed order and shipped large quantities of barley to England. Owing to a fall in the market for barley, the plaintiffs, by reason of the shipments,

sustained a serious loss, and they now claimed that the defendants' company should reimburse them for that loss.

The facts are fully stated in 2 C. P. D. 62, where the proceedings in the Common Pleas Division are reported.

Nov. 2, 3. *Herschell, Q. C.* (*Benjamin, Q. C.*, and *W. H. Butler* with him), for the plaintiffs. The question is, whether the statement of claim shows any cause of action. No doubt the case is novel, but if in the progress of mercantile dealing new cases arise, the court will evolve the principle of law necessary to meet the exigencies of them, as was done in Collen *v.* Wright.[1] This action can be supported on two grounds: first, the defendants warranted to the plaintiffs that they had been employed to deliver this message to the plaintiffs, and the defendants are liable for a breach of warranty, in analogy to the case of Collen *v.* Wright,[1] where the agent represented that he was acting for a principal; secondly, the defendants are carrying on the business of delivering telegraphic messages, and they are liable to any one dealing with them who is injured through their negligence in carrying on that business. In Playford *v.* United Kingdom Telegraph Co.[2] the action was brought for a mere error in the delivery of a message, and negligence was not alleged; in the present case negligence is charged, and on demurrer it is admitted that there was negligence.

The defendants warranted that the message was correct, or at least that their agents would take every precaution to avoid mistake. In Collen *v.* Wright[1] it was held that the plaintiff could sue an agent, because by purporting to act as agent he warranted that he was an agent; here the defendants, by delivering the message to the plaintiffs, warranted that they had authority to deliver the message. The general rule is that the representation must be false to the knowledge of the party making it in order to maintain an action on it. Upon

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

[2] Law Rep. 4 Q. B. 706.

this general rule an exception has been engrafted by Collen *v.* Wright,[1] that a person representing himself to be an agent impliedly contracts that he has the authority of his alleged principal. The defendants, in effect, warranted that they had the authority of Dickson, Robinson, & Co. to deliver the message, and they warranted that the message was sent by them; it therefore falls within the principle of the exception, which has been established by Collen *v.* Wright.[1]

On the other point, as to negligence, if a person carrying on a business acts negligently in conducting that business, he is liable to any person dealing with him who is injured by his negligent act. The defendants, in carrying on their business negligently delivered a message, which they knew might be mischievous if they delivered it to the wrong person. The telegram was supposed by the plaintiffs to be received, not from a stranger, but from persons who were in the habit of dealing with the defendants in the course of their business by means of a cipher, and it was the duty of the defendants to use the cipher with due care. This they failed to do, and therefore they are liable to compensate the plaintiffs for the injury sustained by them.

If the defendants are not liable in the present action very serious consequences will ensue. A telegraph company may deliver a message to a person for whom it is not intended, and may with impunity cause very great injury to the person who receives it and is induced to act upon it. The consequence will be that telegraph companies will become careless in the conduct of their business, and very great public detriment will be sustained.

A great analogy exists between the liability of a common carrier and a telegraph company. Sedgwick on Damages, 6th ed. p. 443; New York and Washington Printing Telegraph Company *v.* Dryburgh.[2] A carrier is bound to

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

[2] 35 Penns. Rep. 298.

deliver safely the goods intrusted to him, and a telegraph company are equally bound to transmit to the proper recipients the messages which they undertake to send along their lines.

Watkin Williams, Q. C. (*H. D. Greene* with him), for the defendants. Collen *v.* Wright[1] forms no exception to the general rule that no action will lie for an innocent misrepresentation; the principle of that decision is that a person who, by representing himself to be an agent, invites another to enter into a negotiation with him, shall be held liable for the consequences if that representation turns out to be untrue. The law does not imply any warranty by a telegraph company that the messages sent by them are correct; and from the nature of the business it is plain that the company do not warrant that those whom they employ shall not commit mistakes; their servants and agents may often be ignorant of the real meaning of a message, and they have no power of ascertaining in what sense the words are to be understood by the intended recipient. It may be true that negligence on the part of the telegraph company was not charged in Playford *v.* United Kingdom Telegraph Company;[2] but it is a fallacy to contend that this circumstance rendered that decision inapplicable, for negligence involves the omission of a duty, and here the defendants did not owe to the plaintiffs any duty, for no relation existed between them, and a duty can only be created either by law or by contract.

Herschell, Q. C., did not reply.

BRAMWELL, L. J. I am of opinion that this judgment must be affirmed.

The general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the per-

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

[2] Law Rep. 4 Q. B. 706.

son making it. This general rule is admitted by the plaintiffs' counsel, and *primâ facie* includes the present case. But then it is urged that the decision in Collen *v.* Wright [1] has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that Collen *v.* Wright,[1] properly understood, shows that there is an exception to that general rule. Collen *v.* Wright [1] establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in Collen *v.* Wright.[1] If so, it appears to me that it does not apply to the facts before us, because in the present case I do not find any request by the defendants to the plaintiffs to do anything. The defendants are simply the deliverers of what they say is a message from certain persons to the plaintiffs. No contract exists: no promise is made by the defendants, nor does any consideration move from the plaintiffs. It appears to me, therefore, that there is a distinction between this case and Collen *v.* Wright,[1] and consequently we cannot have recourse to that case to take this out of the general rule to which I have referred.

But then it is argued that this is a case of misfeasance, that is, a case of negligence. Now the defendants' counsel made a remark which seemed to me very just, namely, that before any person can complain of negligence he must make out a duty to take care; and that that duty to take care can only arise in one of two ways, namely, either by contract

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch 8. E. & B. 647; 27 L. J. (Q. B.) 215.

or by the law imposing it. That it does not arise by contract in this case is shown by the observations which I have already made for the purpose of pointing out that there is no contract between the plaintiffs and the defendants. Does that duty arise by law? If it did arise by law, the consequence would be that the general rule which has been admitted to exist is inaccurate, and that it ought to be laid down in these terms, that no action will lie against a man for misrepresentation of facts whereby damage has been occasioned to another person, unless that misrepresentation is fraudulent or careless. But it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness. It seems to me therefore, that that point also fails the plaintiffs.

Further the defendants did not guarantee that the message was authentic, and so far as they were concerned it might not be true. The action is not maintainable upon the ground of an implied warranty that the message was correct.

Another point raised was that the mistake was committed in the ordinary business of the defendants. I hardly know how that was made a separate ground of argument. Inaccuracy in a telegram is more likely to mislead than inaccuracy in a verbal statement; and the delivery of a telegraphic message is a more formal matter than the communication of a message by word of mouth. I cannot, however, see any distinction in principle between them.

It has been argued that if this action be not maintainable the consequences will be mischievous. I am not of that opinion. If it were held that a person is liable for a negligent misrepresentation, however *bonâ fide* made, a great check would be put upon many very useful and honest communications, owing to a fear of being charged, and perhaps untruly charged, with negligence. I do not think the rule upon which we are acting unreasonable either in itself or in its application to a telegraph company. It is to be recollected that a telegraph company are generally under some

liability to the sender of the message, and if they are careless in delivering it and thereby occasion damage to him, he may maintain an action against them; and (apart from the natural desire to carry on their business properly so as to gain customers) the existence of this liability is a kind of security for the proper delivery of the messages intrusted to the telegraph company.

I wish further to say that I do not see any analogy between the liability of a common carrier and that of a telegraph company. A carrier is liable both to the person who employs him and also to the owner of the goods: but the plaintiffs did not employ the defendants, and they are not the owners of the message. Possibly some analogy may exist between the present facts and a case where a carrier has delivered goods to a person, for whom they were not intended, and who has in consequence suffered some loss or inconvenience; but I do not think that under such circumstances an action would be maintainable against the carrier; for the person to whom the goods were delivered might have refused to receive them, and when he took them in he accepted the risk flowing from a possible mistake of the carrier.

In no point of view is the present action maintainable.

BRETT, L. J. Upon consideration of the nature of the business of a telegraph company, it seems to me plain that all that they undertake to do is to deliver a message from the person who employs them, and that they perform the part of mere messengers; *primâ facie*, therefore, their only contract is with the person who employs them to send and deliver a message. In the present case, the plaintiffs did not send the message, and therefore the defendants have made no contract with them. The defendants have in effect made a representation which is false in fact, but which they did not know to be false at the time of making it. If the case for the plaintiffs be simply that there was a misrepresentation upon which they have reasonably acted

to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false. This seems to be admitted by the plaintiffs' counsel; it is urged, however, that Collen *v.* Wright[1] has introduced an exception to that rule; but after the argument of the defendants' counsel I have come to the conclusion that the decision in that case was founded upon a different and independent rule, which may be stated to be, that where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into upon that footing, he is liable to an action if he does not fill that character; but the liability arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation. Therefore the decision in Collen *v.* Wright[1] does not establish an exception to the rule that an innocent misrepresentation does not form the ground of an action. Now the telegraph company, being mere messengers, did not either expressly or impliedly invite the plaintiffs to act with them in any character, and the present facts do not fall within the principle of that case.

It was further suggested that the defendants are liable by reason of negligence; but when the argument for the plaintiffs as to negligence is examined, it is found to be based upon the doctrine, that where a person has been led by the negligence of another to act under the belief of a certain state of facts and in consequence has suffered detriment, the person guilty of negligence is liable to make good that loss; but this doctrine properly applies to cases of estoppel; and the facts before us do not allow the plaintiffs to rely upon the defendants' negligence as a ground of estoppel. Swan *v.* North British Australasian Company.[2]

I cannot see that any liability rests upon the defendants,

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

[2] 2 H. & C. 175; 32 L. J. (Ex.) 273.

and therefore I think that the judgment of the Common Pleas Division should be affirmed.

COTTON, L. J. I also am of opinion that the judgment of the Common Pleas Division should be affirmed.

The authority most relied on by the plaintiffs' counsel was Collen *v.* Wright.[1] Now it is quite clear that the decision in that case went upon the ground that the testator of the defendants by his conduct impliedly warranted that he had the authority which he professed to have; and this is plain from the language of Willes, J., in delivering the judgment of the Exchequer Chamber.[2] Now the principle of that case cannot apply here. The defendants did not enter into a contract with the plaintiffs, nor did they represent that they had any authority to act as agents for the plaintiffs' Liverpool house: they simply delivered the message and left the plaintiffs to act or not to act upon it, as they pleased; therefore it cannot be said that in consequence of a request by the defendants the plaintiffs undertook any liability or were induced in any way to act upon the message. There being no contract between the parties to the present suit, Collen *v.* Wright[1] is distinguishable.

It was further contended for the plaintiffs that the defendants were liable by reason of their negligence. It was admitted that misrepresentation alone would not have supported an action; but it was contended that, owing to the nature of the business carried on by the defendants, they were bound to warrant the accuracy of the message, or at least to guarantee that every precaution had been taken by their agents to avoid mistake, and that the message was sent by the persons by whom it purported to be sent. I cannot concur in this argument. A person comes into the telegraph office and writes out a message to be forwarded by the company; how can the company ascertain whether the person in whose name the message is sent has really author-

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

[2] 8 E. & B. 647, at pp. 657, 658; 27 L. J. (Q. B.) 215, at pp. 217, 218.

ized its transmission? It is impossible to suppose that the company in the ordinary course of their business warrant that the message comes from a particular person; for they would thereby make a representation, the truth of which in many cases they cannot ascertain.

Judgment affirmed.[1]

Solicitors for plaintiffs: *G. L. P. Eyre & Co.*, agents for *Garnett, Tarbet, & Tinne, Liverpool.*

Solicitors for defendants: *Johnsons, Upton, & Budd.*

JAMES VAN HORN ET AL. *v.* AMOS H. VAN HORN ET AL.

Supreme Court of New Jersey, 1890.

[*Reported in* 52 *N. J. L.* 284.]

ON demurrer. Case certified from the Essex Circuit.

The defendants Amos H. Van Horn and Casper Soer, Jr., were summoned to answer James Van Horn and Emma D. Van Horn, his wife, in tort, for a conspiracy or combination to break up the wife's separate business of selling fancy goods, on consignment, at Newark. Two firms of wholesale jobbers in fancy and millinery goods had agreed, verbally, to supply her on credit with a stock of such goods, to be sold by her on commission, limiting the total amount to $2,500. One of said firms had, in pursuance of the agreement with her, sent $500 worth of goods, which were received and placed in her store for sale, and she was daily expecting the balance. With this prefatory statement, the declaration charges, that the defend-

[1] Compare Winterbottom *v.* Wright, 10 M. & W. 109 (1842); Thomas *v.* Winchester, 6 N. Y. 397 (1852); Heaven *v* Pender, 11 Q. B. D. 503 (1883); Dickle *v.* Nashville Abstract Company, 89 Tenn. 431 (1890); Heizer *v.* Kingsland & Douglass Manufacturing Co., 110 Mo. 605 (1892). See Pollock on Torts (third ed.), 494–497.

ants, maliciously intending to injure and drive the said Emma D. Van Horn out of business, and into public scandal, shame and disgrace, and to injure her in her credit and business, and to prevent her from acquiring any profit or gain therefrom, or from continuing the same, did maliciously conspire, combine and agree to prevent her from enjoying and continuing her business, and in pursuance of said conspiracy, etc., did entice into their store, in Newark, one of the plaintiff's employees, and, by artful persuasion and threats, induced her to tell where the plaintiff's stock of goods was purchased, telling her the stock would be taken from her and the business closed up; and in pursuance and in further performance of their unlawful intent and combination, endeavored to prevent the customers and friends of the plaintiff from dealings with her, by falsely and fraudulently representing to them that she would not be able to carry on her business, but would have to close up, as she was selling goods that did not belong to her, and living off the proceeds, instead of accounting therefor, and by sending threatening notes and messages to them, designed to intimidate them from having any dealings with her, and did threaten to pursue her until she was ruined; that in further pursuance of such combination, and by means of fraud and deceit, they did persuade the said firm in New York to decline to complete their contract, and did prevail on them, by means of corrupt, fraudulent and deceitful representations and statements as to the personal and business character and standing of the plaintiff, to remove the stock already supplied her, and refuse to deliver her other goods as agreed for, leaving her entirely without any stock to sell, or customers to purchase from her; by means whereof she was left without stock and credit with the said firms, and could not obtain goods from other parties, and was driven out of her business and occupation and deprived of the profit and livelihood which she was making and daily increasing.

To this declaration a general demurrer was filed, and joinder added.

Argued at February Term, 1890, before BEASLEY, Chief Justice, and Justices DEPUE and SCUDDER.

For the plaintiffs, *R. H. McCarter.*

For the defendants, *Samuel Kalisch.*

The opinion of the court was delivered by

SCUDDER, J. The merely formal parts of this declaration will not be considered on the general demurrer, but the whole will be examined to determine whether it sets forth, in substance, a legal cause of action. The case has been elaborately discussed by counsel, because the principles involved may affect other cases of even greater importance than this, and lead to serious complications where actions are brought between rivals in business, or those who interfere with the ordinary course of trade to the detriment of others.

A careful consideration of the subject has led me to the conclusion, that this case is readily distinguishable from many that have been cited in the argument, and does not involve many of the questions that have been presented.

It is not necessary to consider the office of the ancient writ of conspiracy, and the process by which, in time, it was superseded by the later and more efficacious action on the case for conspiracy, and the still more modern action for malicious prosecution. Nor will it now be advantageous to show how long and difficult it was to separate the idea of a criminal conspiracy at common law, where the agreement or conspiracy was the *gravamen* of the offence, from the real complaint in a civil action, that the combination of two or more persons has enabled them to inflict a great wrong on the plaintiff. The combination or conspiracy in the latter case was, therefore, a matter of aggravation or inducement only, of which one or all might be found guilty, while in the former, it was essential to show that two or more had joined in an agreement to do an unlawful act, or to do a lawful act in an unlawful manner. The distinction is now well established, that in civil actions

the conspiracy is not the *gravamen* of the charge, but may be both pleaded and proved as aggravating the wrong of which the plaintiff complains, and enabling him to recover against all as joint tortfeasors. If he fails in the proof of a conspiracy or concerted design, he may still recover damages against such as are shown to be guilty of the tort without such agreement. Poll. Torts, 267; Gary *v.* Frazer, 76 Me. 37; Hutchins *v.* Hutchins, 7 Hill, 104; Jones *v.* Baker, 7 Cow. 445; Barker *v.* Huntingdon, 2 Gray, 124.

The declaration begins in this form, and is unexceptionable in this particular. It is an action on the case, setting forth a malicious conspiracy or confederation, with the means employed to effect its purpose, and the resulting damages to the plaintiff. No further specification is required than the general terms in which it is pleaded in the declaration.

We have not presented for determination in this pleading the vexed question, whether an action will lie against a third person for the malicious procurement of the breach of a contract, if by such procurement damage was intended to result, and did result, to the plaintiff. Lumley *v.* Gye, 2 El. & B. 216; Brown *v.* Hall, 9 Q. B. Div. 333.

In the opinion of Mr. Pollock (*ubi supra*), the difficulties in such cases disappear, or are greatly reduced, when the cause of action is considered as belonging to the class in which malice, in the sense of actual ill-will, is a necessary element. Here the whole pleading is based on the malicious conduct of the defendants, in destroying the plaintiff's credit and patronage, and breaking up her business and means of livelihood.

The case is, however, further distinguished from the cases cited above, and separated from the questions of difficulty involved in some of them, because here no breach of contract is alleged. There was no binding contract between the New York firms and the plaintiff, upon which they could be sued for a breach. Where there is a suable contract between a contractor and contractee, there is diffi-

culty, in principle, in showing privity in another, or to make the person who procures a breach of the contract the proximate cause of injury. The party who breaks the contract, for whatever cause, whether by procurement of others or of his own volition, is primarily responsible to the other party; and the procurer, it would seem, can only be held responsible for the breach where there is malice shown to the sufferer, giving a distinct cause of action for the malice which caused the breach of the contract, resulting in damages to him.

The plaintiff, Emma D. Van Horn, it is alleged, was selling goods on consignment from others, with the expectation of greater consignments in the future. If the consignors refuse to send the goods to her, it does not appear that she could have any remedy against them. They could send or recall them at pleasure. The complaint here is, that the goods in the plaintiff's possession were recalled, and her advantageous arrangement for credit with the consignors ended by the fraudulent and malicious act of the defendants. If she have no remedy against the defendants, she can have none against others for the wrong which she claims she has suffered.

The difference between this action and slander is well stated in Riding *v.* Smith, 1 L. R. Exch. Div. 91, where a slander against the wife was charged as having injured the husband's business. Her name was stricken from the record, as a joint plaintiff, and the action was allowed to proceed by the husband, as a trader, carrying on business, founded on an act done by the defendant which led to loss of trade and custom by the plaintiff. It was maintainable on the ground that the injury to the plaintiff's business was the natural consequence of the words spoken, which would prevent persons resorting to the plaintiff's shop.

Upon the whole case presented in the declaration, Mogul Steamship Co. *v.* McGregor, &c., 21 Q. B. Div. 544, s. c. 23 Q. B. Div. 598, is important to aid in preserving the distinction between injuries caused by mere rivalries in

business, without the intention of ruining the trade of the plaintiff, and those where such intent is shown with personal malice toward him.

In the first report, Lord Chief Justice Coleridge says: "It is too late to dispute, if I desired to do so, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this." In the later report, Lord Justice Fry, after a full statement of cases, says, that no mere competition carried on for the purpose of gain, and without actual malice, is actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect. Lord Esher, M. R., dissented. It was decided that the exclusion of the plaintiffs, rival freighters, from participation in a five per cent. rebate on freight on teas from China, not being through malice, but in competition to increase their own business, was not actionable.

The basis of action seems here to be, as stated in the declaration, the fraudulent and malicious acts of the defendant in driving the plaintiff, Emma D. Van Horn, out of her business; the statement of the means used to effect this purpose all combine to produce a single cause of action, and are not objectionable for duplicity. But, if there were duplicity in the pleadings, this is not ground for a general demurrer.

The demurrer should be overruled.[1]

STANLEY *v.* POWELL.

[*Reported in* [1891] 1 *Q. B.* 86.]

FURTHER consideration before DENMAN, J.

The facts and arguments sufficiently appear from the judgment.

[1] Compare Walker *v.* Cronin, 107 Mass. 555 (1871); Delz *v.* Winpee, 80 Tex. 400 (1891); Temperton *v.* Russell, [1893] 1 Q. B. 715, C. A. See J. H. Wigmore on "The Boycott and Kindred Practices as ground for Damages," 21 Am. L. Rev. 509 (1887), and on "Interference with Social Relations," id. 764.

Kemp, Q. C. (*W. H. C. Payne*, with him), for the plaintiff.
H. Dickens and T. Willes Chitty, for the defendant.

The following cases were cited on behalf of the defendant, in addition to those referred to in the judgment: Davis *v.* Saunders, 2 Chit. 639; Alderson *v.* Waistell, 1 C. & K. 358; Smith *v.* London and South-Western Ry. Co., Law Rep. 6 C. P. at p. 22, per Blackburn, J.; Manzoni *v.* Douglas, 6 Q. B. D. 145; Brown *v.* Kendall, 60 Mass. 292; The Nitro-Glycerine Case, 15 Wallace, 524.[1]

Nov. 3. DENMAN, J. This case was tried before me and a special jury at the last Maidstone Summer Assizes.

In the statement of claim the plaintiff alleged that the defendant had *negligently and wrongfully and unskilfully* fired his gun and wounded the plaintiff in his eye, and that the plaintiff, in consequence, had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the jury: (1) Was the plaintiff injured by a shot from defendant's gun? (2) Was the defendant guilty of negligence in firing the charge to which that shot belonged as he did? (3) Damages.

The undisputed facts were, that on November 29, 1888, the defendant and several others were pheasant shooting in a party, some being inside and some outside of a wood which the beaters were beating. The right of shooting was in one Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and

[1] It was suggested on behalf of the defendant that, even if a purely accidental trespass were in general a ground of action, the plaintiff was precluded from maintaining the action in the present case by reason of the fact that he was himself a member of the shooting party, and as such must be treated as having taken upon himself all the risks ordinarily incident to the sport. On this point reference was made to a *dictum* of Blackburn, J., in Fletcher *v.* Rylands (Law Rep. 1 Ex. at pp. 286–287); but the present judgment is not founded on any such consideration. — REPORTER.

the game which might be shot. Several beaters were driving the game along a plantation of saplings towards an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation, at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along, a pheasant rose inside the plantation; the defendant fired one barrel at this bird, and according to the evidence for the defendant, struck it with his first shot. There was a considerable conflict of evidence as to details; but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back towards the beaters, whereupon the defendant fired his second barrel and killed the bird, but that a shot, glancing from the bough of an oak which was in or close to the hedge, and striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second barrel was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line, that the shot must have been diverted to a considerable extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant, in a direct line, when the second barrel was fired, was about thirty yards. The case for the plaintiff was entirely different; but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to them in the negative. Before summing up the case to the jury, I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases, — that, even in the absence of negligence, an action of trespass might lie; and it was agreed that I should leave the question of negligence to the jury, but that, if necessary, the pleadings

were deemed to have been amended so as to raise any case or defence open upon the facts with liberty to the court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the court for judgment; but it was afterwards agreed that the case should be argued before myself on further consideration, and that I should give judgment, notwithstanding that I had left the parties to move the court, as though I had originally reserved it for further consideration before myself.

Having heard the arguments, I am of opinion that, by no amendment that could be made consistently with the finding of the jury could I properly give judgment for the plaintiff. It was contended on his behalf that this was a case in which an action of trespass would have lain before the Judicature Acts; and this contention was mainly founded on certain *dicta* which, until considered with reference to those cases in which they are uttered, seem to support that contention; but no decision was quoted, nor do I think that any can be found which goes so far as to hold that if A is injured by a shot from a gun fired at a bird by B, an action of trespass will necessarily lie, even though B is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

The jury having found that there was no negligence on the part of the defendant, the most favorable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass, and to consider that the defendant has put upon the record a defence denying negligence, and specifically alleging the facts, sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the year-book 21 Hen. 7, 28 A, which is referred to by Grose,

J., in the course of the argument in Leame *v.* Bray, 3 East, 593; to be mentioned presently, in these words: "There is a case put in the year-book 21 Hen. 7, 28 A, that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." Returning to the case in the year-book, it appears that the passage in question was a mere *dictum* of Rede, who (see 5 Foss' Lives of the Judges, p. 230) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is *unintentional*. The words relied on are, "Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent." But in that very passage Rede makes observations which show that he has in his mind cases in which that which would be *primâ facie* a trespass may be excused. The next case in order of date relied upon for the plaintiff was Weaver *v.* Ward, Hob. 134; decided in 1607. There is no doubt that that case contains *dicta* which *per se* would be in favor of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *primâ facie* trespasses: "Therefore, no man shall be excused of a trespass . . . except it may be judged utterly without his fault," showing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and defendant were skirmishing as soldiers of the trainband, and the one, "*casualiter, et per infortunium et contra voluntatem suam*" (which must be translated "accidentally and involuntarily"), shot the other, an action of trespass would lie, *unless* he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed, in which there could be no two opinions about the matter; but other

cases may, as the present case did, involve considerable conflicts of evidence and opinion which until recently a jury only could dispose of. The case of Gibbons *v.* Pepper, 4 Mod. 404, decided in 1695, merely decided that a plea showing that an accident caused by a runaway horse was inevitable, was a bad plea in an action of trespass, because if inevitable that was a defence under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The concluding words of the judgment which show clearly the *ratio decidendi* of that case are these: "He should have pleaded the general issue, for if the horse ran away against his will he would have been found not guilty, because in such a case it cannot be said with any color of reason to be a battery in the rider." The more modern cases of Wakeman *v.* Robinson, 1 Bing. 213, and Hall *v.* Fearnley, 3 Q. B. 919, lay down the same rule as regards the pleading point, though the former case may also be relied upon as an authority by way of *dictum* in favor of the plaintiff, and the latter may be fairly relied upon by the defendant; for Wightman, J., in his judgment, explains Wakeman *v.* Robinson, *supra*, thus: "The act of the defendant" (viz., driving the cart at the very edge of a narrow pavement on which the plaintiff was walking, so as to knock the plaintiff down) "was *primâ facie* unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of Wakeman *v.* Robinson, *supra*. It was there agreed that an *involuntary* act might be a defence on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the *omission to plead* the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover."

But in truth neither case decides whether where an act such as discharging a gun is voluntary, but the result injurious without negligence, an action of trespass can nevertheless be supported as against a plea pleaded and

proved, and which the jury find established, to the effect that there was no negligence on the part of the defendant.

The case of Underwood *v.* Hewson, 1 Str. 596, decided in 1724, was relied on for the plaintiff. The report is very short: "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass — Strange *pro defendente.*" The marginal note in Nolan's edition of 1795, not necessarily Strange's own composition, is this — "Trespass lies for an accidental hurt; and in that edition there is a reference to Buller's N. P., p. 16. On referring to Buller, p. 16, where he is dealing with Weaver *v.* Ward, 14 Jac. 1, Hob. 134, I find he writes as follows: "So (it is no battery) if one soldier hurt another in exercise; but if he plead it he must set forth the circumstances, so as to make it appear to the court that it was inevitable, and that he commited no negligence to give occasion to the hurt, for it is not enough to say that he did it *casualiter, et per infortunium, et contra voluntatem suam;* for no man shall be excused of a trespass, unless it be justified entirely without his default (Weaver *v.* Ward, *supra*); and, therefore, it has been holden that an action lay where the plaintiff standing by to see the defendant uncock his gun was accidentally wounded. Underwood *v.* Hewson, T. 10 Geo. 1; per Fortescue and Raymond in Midd., Str. 596." On referring back to Weaver *v.* Ward, *supra*, I can find nothing in the report to show that the court held, that in order to constitute a defence in the case of a trespass it is necessary to show that the act was inevitable. If inevitable, it would seem that there was a defence under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what Weaver *v.* Ward, *supra*, really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault."

Day *v.* Edwards, 5 T. R. 648 (1794), merely decides that

where a man negligently drives a cart against the plaintiff's carriage, the injury being committed by the immediate act complained of, the remedy must be trespass and not case.

But the case upon which most reliance was placed by the plaintiff's counsel was Leame *v.* Bray, 3 East, 593. That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway against the plaintiff's curricle, which the plaintiff's servant was driving, by means whereof the servant was thrown out, and the horses ran away, and the plaintiff, who jumped out to save his life, was injured. The facts stated in the report include a statement that "the accident happened in a dark night owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side, there was ample room for the carriages to have passed without injury." The report goes on to state: "But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was therefore objected for the defendant, that the injury *having happened from negligence* and not wilfully, the proper remedy was by an action on the case, and not of trespass *vi et armis*; and the plaintiff was thereupon nonsuited." On the argument of the rule to set aside the verdict the whole discussion turned upon the question whether the injury was, as put by Lawrence, J., at p. 596 of the report, immediate from the defendant's act, or consequential only from it, and in the result the nonsuit was set aside. But it clearly appears from the report that there was evidence upon which the jury might have found negligence, and indeed the defendant's counsel assumed it in the very objection which prevailed with Lord Ellenborough when he nonsuited the plaintiff. There is nothing in any of the judgments to show that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of

any negligence, but (for instance) that the accident happened wholly through the darkness of the night making it impossible to distinguish one side of the road from the other and without negligence on either side, the court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875, in the case of Holmes *v.* Mather, Law Rep. 10 Ex. 261, and Bramwell, B., in giving judgment in that case, dealt with them thus: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful, or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions."

This view of the older authorities is in accordance with a passage cited by Mr. Dickens from Bacon's Abridgment, Trespass, I., p. 706, with a marginal reference to Weaver *v.* Ward, 14 Jac. 1; Hob. 134. In Bacon the word "inevitable" does not find a place. "If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful" (by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury, as, for instance, in a case of self-defence) "and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental" (by which I understand, "that the injury was unintentional"), "but likewise that it was not owing to neglect or want of due caution." In the present case the plaintiff sued in respect of an injury owing to the defendant's negligence, — there was no

pretence for saying that it was intentional so far as any injury to the plaintiff was concerned, — and the jury negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that against any statement of claim which the plaintiff could suggest, the defendant must succeed if he were to plead the facts sworn to by the witnesses for the defendant in this case, and the jury, believing those facts, as they must now be taken by me to have done, found the verdict which they have found as regards negligence. In other words, I am of opinion that if the case is regarded as an action on the case for an injury by negligence, the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am, therefore, of opinion that I am bound to give judgment for the defendant. As to costs, they must follow unless the defendant foregoes his right.

Judgment for the defendant.

Solicitor for plaintiff: *H. Fawsett.*

Solicitors for defendant: *Smith, Stenning, & Croft, agents for Stenning,* Tonbridge.[1]

[1] Compare Leame *v.* Bray, 3 East, 593 (1803); Wakeman *v.* Robinson, 1 Bing. 213 (1823); Brown *v.* Kendall, 6 Cush. 292 (1850); Castle *v.* Duryee, 2 Keyes, 169 (1865); The Nitro-Glycerine Case, 15 Wall. 524 (1872).

CHAMBERS & MARSHALL *v.* BALDWIN.

Court of Appeals of Kentucky, 1891.

[*Reported in* 91 *Ky.* 121.]

APPEAL from Circuit Court, Mason County.
Wall & Worthington, Cochran & Son, for appellants.[1]
Wadsworth & Son, for appellee.

JUDGE LEWIS delivered the opinion of the court.

The cause of action stated in the petition of appellants is in substance: That, as partners doing business under the firm name of Chambers & Marshall, they made a contract with one Wise, whereby he sold and agreed to deliver to them in good order, during delivery season of 1877, his half of a crop of tobacco, then undivided, which he had raised on shares upon the farm of appellee, in consideration whereof they promised to pay on delivery at the rate of five cents per pound; that they were ready, able, and willing to receive and pay for the tobacco as and at the time agreed on, and demanded of him compliance with the contract, but he had already delivered it to appellee and Newton Cooper, tobacco-dealers, and then notified appellants he would not deliver it to them, and they might treat the contract as broken and at end; that appellee knew of the existence of said contract, but maliciously, on account of his personal ill-will to Chambers, one of appellants, and with design to injure by depriving them of profit on their purchase, and to benefit himself by becoming purchaser in their stead, advised and procured Wise, who would else have kept and performed, to break the contract, whereby they have been damaged $——; that he, Wise, was at the time known by appellee to be, and now is, insolvent; so, being without other redress, they bring this action.

[1] The reporter's abstract of the arguments for the appellants is omitted.

Appellee is alleged to have been actuated to do the act complained of by ill-will to one of appellants only, which, however, to avoid confusion, we will treat as a malicious intent to injure both; and also by a design to benefit himself by becoming purchaser of the tobacco for the firm of which he was a member. And thus two questions of law arise on demurrer to the petition: first, whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it; second, whether an act lawful in itself can become actionable solely because it was done maliciously.

As appellee, being no party to the contract, did not, nor could himself, break it, his wrong, if any, was in advising and procuring Wise to do so. Consequently, while the remedy of appellants against him, Wise, was by action *ex contractu*, recovery being limited to actual damage sustained, their action against appellee is, and could be in no other than form *ex delicto*, recovery, if any at all, not being so limited. Nevertheless, in Addison on Torts, volume 1, p. 37, it is said: "Maliciously inducing a party to a contract to break his contract to the injury of the person with whom the contract was made creates that conjunction of wrong and damage which supports an action."

The authority cited in support of the proposition thus stated without qualification is the English case of Lumley *v.* Gye, 2 El. & Bl. 228, decided in 1853, followed by Bowen *v.* Hall, decided in 1881, and reported in 20 Amer. Law Reg. (N. S.) 578, though it is proper to say there was a dissenting opinion in each case.

The action of Lumley *v.* Gye was in tort, the complaint being that the defendant maliciously enticed and procured a person under a binding contract to perform at plaintiff's theatre, to refuse to perform and abandon the contract. The majority of judges held, and the case was decided upon the theory, that remedies given by the common law in such cases are not, in terms, limited to any description of servants or service, and the action could be maintained

upon the principle, laid down in Comyns' Digest, that "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." The position of Justice Coleridge was to the contrary, that as between master and servant there was an admitted exception to the general rule of the common law confining remedies by action to the contracting parties, dating from the Statute of Laborers, passed in 25 Edw. III., and both on principle and authority limited by it; and that "the existence of intention — that is, malice — will in some cases be an essential ingredient in order to constitute the wrongfulness and injurious nature of the act; but it will neither supply the want of the act itself or its hurtful consequences."

We have been referred to some American cases as being in harmony with the two cases mentioned. In Walker *v.* Cronin, 107 Mass. 555, it was held that where a contract exists by which a person has a legal right to continuance of services of workmen in business of manufacturing boots and shoes, and another knowingly and intentionally procures it to be violated, he may be held liable for the wrong, although he did it for the purpose of promoting his own business. But it was not alleged the defendant in that case had any such purpose in procuring the persons to leave and abandon the employment of the plaintiff, the real grievance complained of being damage by the wanton and malicious act of defendant and others. In Haskins *v.* Royster, 70 N. C. 601, it was held that if a person maliciously entices laborers or croppers on a farm to break their contract and desert the service of their employer, damages may be recovered against him. But both those cases relate to rights and duties growing out of the relation of employer and persons agreeing to do labor and personal service, and do not apply here, except so far as the decisions rest upon other grounds than the Statute of Laborers. In Jones *v.* Stanley, 76 N. C. 355, it was, however, held that the same reasons which controlled the

decision rendered in Haskins *v.* Royster "cover every case in which one person maliciously persuades another to break any contract with a third person; it is not confined to contracts for service." But we have not seen any other case in which the doctrine is stated so broadly.

Chesley *v.* King, 74 Me. 164, we do not regard at all decisive, because the court went no farther than to say they were inclined to the view that there may be cases where an act, otherwise lawful, when done for the sole purpose of damage to a person, without design to benefit the doer or others, may be an invasion of the legal rights of such person.

Cooley on Torts, 497, agreeing with Justice Coleridge, says: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff, the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it." And it seems to us that rule harmonizes with both principle and policy, and to it there can be safely and consistently made but two classes of exception; for, as to make a contract binding, the parties must be competent to contract and do so freely, the natural and reasonable presumption is, that each party enters into it with his eyes open, and purpose and expectation of looking alone to the other for redress in case of breach by him. One such exception was made by the English Statute of Laborers to apply where apprentices, menial servants, and others whose sole means of living was by manual labor, were enticed to leave their employment, and may be applied in this State in virtue of and as regulated by our own statutes. The other arises where a person has been procured, against his will or contrary to his purpose, by coercion or deception of another, to break his contract. Green *v.* Button, 2 Cromp. M. & R. 707; Ashley *v.* Dixon, 48 N. Y. 430.

But as Wise was not induced by either force or fraud to break the contract in question, it must be regarded as

having been done of his own will and for his own benefit; and his voluntary and distinct act, not that of appellee, being the proximate cause of damage to appellants, they, according to a familiar and reasonable principle of law, cannot seek redress elsewhere than from him. That an action on the case will lie whenever there is concurrence of actual damage to the plaintiff and wrongful act by the defendant is a truism, yet unexplained, misleading. The act must not only be the direct cause of the damage, but a legal wrong, else it is *damnum absque injuria*. But whether a legal wrong has been done, for which the law affords reparation in damages, depends upon the nature of the act, and cannot be consistently or fitly made to depend upon the motive of the person doing it; for an act may be tortious, and consequently actionable, though not malicious nor even wilful. If it was not so, there could be no reparation for an act of pure negligence though ever so hurtful in its effects. And it is just as plain that an act which does not of itself amount to a legal wrong without, cannot be made so by, a bad motive accompanying it; for there is no logical process by which a lawful act done in a lawful way can be transformed or not into a legal wrong, according to the motive, bad or good, actuating the person doing it.

The proposition is clearly and forcibly stated in Jenkins *v.* Fowler, 24 Pa. St. 308, as follows: "Malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful. When a creditor who has a just debt brings a suit or issues execution, though he does it out of pure enmity to the debtor, he is safe. In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff by proclaiming his infamy will not defeat justification. One who prosecutes another for a crime need not show he was actuated by correct feelings, if he can prove that there was good reason to believe the charge was well founded. In short, any transaction which would be lawful if the

parties were friends cannot be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches hearts."

In Frazier *v.* Brown, 12 Ohio St. 294, the cause of action stated was diversion, with malicious intent by the defendant, of subterranean water on his own land from adjoining land of the plaintiff. But it was held there could be no recovery, because, as said by the court, "the act done, to wit, the *using* of one's own property, being lawful in itself, the motive with which it is done, whatever it may be as a matter of conscience, is in law a matter of indifference." In Chatfield *v.* Wilson, 28 Vt. 49, the action was for the same cause substantially, and the language of the court was: "An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induced it." In Mahan *v.* Brown, 13 Wend. 261, the complaint was that the defendant wantonly and maliciously erected on his own premises a high fence near to and in front of plaintiff's window, without benefit to himself, and for the sole purpose of annoying the plaintiff, thereby rendering her house uninhabitable. But it was held the action would not lie, because, no legal right of the plaintiff having been infringed, the defendant had not so used his property as to injure another, and whether his motive was good or bad, she had no legal cause of complaint. To the same effect is the decided weight of authority in the United States. Adler *v.* Fenton, 24 How. 412; Phelps *v.* Nowlen, 72 N. Y. 39; Benjamin *v.* Wheeler, 8 Gray, 410; Glendon Iron Co. *v.* Uhler, 75 Pa. St. 467; Auburn P. R. Co. *v.* Douglass, 9 N. Y. 444.

Upon neither principle nor authority could this action have been maintained if the same thing it is complained appellee did had been done by a person on friendly terms with appellant, Chambers, or by a stranger, though he might have profited by the purchase to the damage of

appellants; for competition in every branch of business being not only lawful, but necessary and proper, no person should or can, upon principle, be made liable in damages for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a pre-existing contract between the seller and a rival in business, for a breach of which each party may have his legal remedy against the other; nor, the right to buy existing, should it make any difference, in a legal aspect, what motive influenced the purchaser. Competition frequently engenders, not only a spirit of rivalry, but enmity, and if the motive influencing every business transaction that may result in injury or inconvenience to a business rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered. As pertinently inquired in Auburn P. R. Co. *v.* Douglass: "Independently of authority, if malignant motive is sufficient to make a man's dealings with his own property, when accompanied by damage to another, actionable, where is this principle to stop?" And as correctly said by Lord Coleridge in Bowen *v.* Hall: "The inquiries to which this view of the law (making an act lawful or not according to motive) would lead are dangerous and inexpedient inquiries for courts of justice; judges are not very fit for them, and juries are very unfit."

In our opinion, no cause of action is stated in the petition, and the demurrer was properly sustained.

Judgment affirmed.[1]

[1] See an article on Lumley *v.* Gye, by William Schofield, Esq., in 2 Harv. L. Rev. 19. For further discussion of the rights and duties that contracts create for strangers, see the authorities referred to in the note to Price *v.* Easton, *supra*, 1.

Compare Ashley *v.* Dixon, 48 N. Y. 430 (1872); Jones *v.* Stanley, 76 N. Car. 355 (1877); Bowen *v.* Hall, 6 Q. B. Div. 333 (1881); Ensor *v.* Bogliano, 67 Md. 190 (1887); Boyson *v.* Thorn, 98 Cal. 578 (1893); Temperton *v.* Russell [1893], 1 Q. B. 715, C. A.

MONSON *v.* TUSSAUDS, LIMITED.
MONSON *v.* LOUIS TUSSAUD.

Queen's Bench Division and Court of Appeal.

[*Reported in* [1894] 1 *Q. B.* 671.]

APPLICATIONS in the above-mentioned actions respectively for interim injunctions to restrain the defendants from publishing, exhibiting, or causing to be exhibited a portrait model of the plaintiff, or from advertising, announcing, and placarding the same in any way to the injury of the plaintiff, until the trial of the action or until further order. The indorsements on the writs claimed in substance injunctions to restrain the exhibition of the models and damages for libel.

The facts, so far as it appears necessary to state them for the purposes of this report, were as follows: —

The plaintiff had been tried in Scotland upon a charge of having murdered a young man named Hambrough by shooting him with a gun at a place called Ardlamont. The defence to the charge was that Hambrough was killed by the accidental discharge of his own gun. The jury returned a verdict of "Not proven." Shortly after the trial, the defendants in the first action, who were the proprietors of an exhibition in London, consisting mainly of wax figures of celebrated and notorious personages, placed in their exhibition a portrait model of the plaintiff, bearing his name, with a gun in close proximity thereto described as his gun. This figure was exhibited in a room called the Napoleon Room, No. 2, within a turnstile, at which an extra sixpence was charged for admission. In this room there were four other figures. Of these, one was a recumbent figure of the Emperor Napoleon I., another that of a Mrs. Maybrick, who had been convicted of murder, another that of one Pigott, a witness before the Parnell

Commission, who had committed suicide to avoid arrest, and another that of a man named Scott, who was charged with having been concerned in the alleged murder with which the plaintiff was charged, but who could not be found. There were some other objects of interest in the room; for instance, relics of the Emperor Napoleon and the Duke of Wellington. From this room access could be obtained by descending some stairs without further payment to a room known as the "Chamber of Horrors," in which were exhibited figures, the bulk of which represented murderers and malefactors and also relics connected with, and models of, the scenes of notorious murders. In this room there was a representation of the place where Hambrough's body was found, described by the words "Ardlamont Mystery: Scene of the Tragedy."

The defendant in the second action was the proprietor of an exhibition of a similar nature at Birmingham, which also included a "Chamber of Horrors," for admission to which an extra charge was made. A figure of the plaintiff was exhibited in this exhibition. The figure was placed near others representing royal personages and political celebrities; and outside the "Chamber of Horrors," though in proximity thereto. It was always visible to the public without any extra charge or special division from the general exhibition. Advertisements of this exhibition were inserted by the defendant in various local newspapers, which ended with the words, "See the Chamber of Horrors (extra room, 3*d.*) and the instruments of torture — See Vaillant, the Anarchist, and Monson of Ardlamont. Admission to the Exhibition and Entertainment, 6*d.*" It was stated in argument that the defendants did not intend to justify, the defence in both cases being simply that no imputation on the plaintiff's character was conveyed, and that the exhibition was not libellous.

Coleridge, Q.C., and *Cooper Wylde*, for the plaintiff.

H. Wace, and *E. A. Nepean* (*Finlay, Q. C.*, and *Gye*, with them), for the defendants Tussauds, Limited.

T. Willes Chitty, and *Ernest Pollock*, for the defendant Louis Tussaud.

Cur. adv. vult.

Jan. 19. MATHEW, J. In the case of Monson *v.* Tussauds, Limited, an application was made to us to restrain the defendants until the trial of the action from publishing or exhibiting, or causing to be exhibited, the portrait model of the plaintiff in their exhibition, and from advertising, announcing, and placarding the same, in any way to the injury of the plaintiff. The plaintiff asks for what is known as an interim injunction, and the ground of his application is that the exhibition of which he complains is calculated to disgrace him and to hold him up to public obloquy and contempt. During the hearing of the application it was agreed between the counsel on both sides that any right which the plaintiff had to complain of what the defendants have done depended on the principles underlying the law of libel, and it was not suggested that the exhibition could be interfered with on any other ground. The material facts were these: The plaintiff was tried in Scotland for the murder of Lieutenant Hambrough, and at the trial a man named Scott, who fled, was associated with the plaintiff in the charge. The trial ended in the verdict of the Scotch jury of "Not proven." Immediately after the trial, this exhibition of the figure of the plaintiff commenced. The plaintiff complains that the exhibition directs public attention to him, and reminds the public that he has been suspected of an atrocious crime, and that the trial had the result I have mentioned. The defendants' case is that they intend to cast no imputation whatever upon the plaintiff, but they assert that he had become a notorious person, and they contend that, where a man had become notorious, either for creditable or discreditable reasons, they are at liberty to exhibit his effigy, and so to gratify the public curiosity which had been aroused with regard to him.

In dealing with this argument, it is of importance to

have regard to the nature of the exhibition itself. The published catalogue gives a history of the show, and dwells, as one of its peculiar attractions, on the inclusion in the exhibition of what is known as the "Chamber of Horrors," which contains the effigies of malefactors and miscreants. This Chamber of Horrors was part of the original institution, and was preserved when the exhibition was removed from Paris to London.

The object of the exhibition is described in the following passages from the catalogue: "If the hour brought with it a man or a woman, famous or infamous, the personage of that hour was forthwith modelled, colored, dressed, and given an apportioned place in the Baker Street Galleries. . . . During the forty-two years which have elapsed since the death of Madame Tussaud, unremitting progress has been made in enhancing the variety, the historical accuracy and picturesqueness, and the general interest of the exhibition of which she was the founder." The exhibition, therefore, is the exhibition of the effigies of famous and infamous people whom the public might be expected to desire to see, and not of people who are of no personal interest to the public.

Now, what is the position in the exhibition of the figure of Monson? It appears from the affidavits that one part of the exhibition is given up to the effigies of persons who may justly be described as famous, — famous, that is, for reasons creditable to themselves. In order to see the other part of the exhibition, an extra fee is required, and there is a turnstile which, on the payment of 6*d.* each, admits the public to a room known as the "Napoleon Room," passing through which and descending some stairs, the visitor finds himself in what is known as the "Chamber of Horrors," which contains the effigies of persons the majority of whom are deserving of execration. In this room there is a representation of the scene of what is known as the "Ardlamont mystery," or "Ardlamont tragedy," — that is to say, a representation of the spot in which Lieutenant Hambrough's body was found.

The effigy of Monson is not in the Chamber of Horrors. If it had been placed there, I do not see how it could possibly be contended that there was no imputation that he was one of the persons suspected of the murder of Lieutenant Hambrough, or that any other inference could be drawn than that his effigy was placed there in order to connect him with that tragedy or mystery. The figure is not there, but it is in the room above, within the turnstile, to which access can only be gained by the payment of 6*d.* at the turnstile, and through which it is necessary to pass in order to reach the Chamber of Horrors. In that room there are the figures of Mrs. Maybrick, who was convicted of murder, of Pigott, the witness in the Parnell Commission, of Monson, and of Scott. The names of the figures are appended to them; but there is nothing more. The room also contains some relics of the Great Napoleon and of the Duke of Wellington. Does it make any difference that the effigy of Monson is not placed in the Chamber of Horrors, but in the vestibule of that chamber? To my mind, it makes no difference at all. Of course, I am dealing with a question of fact, and can only use my own judgment; but it is clear to me that it was intended by placing the effigy of Monson where it stands to connect him discreditably with the scene of the Ardlamont mystery which is depicted in the Chamber of Horrors, and the imputation is as clear as if a label had been placed on the figure: "This is Monson, who was suspected of the murder of Lieutenant Hambrough." Under those circumstances I am of opinion that a jury ought to find that an actionable wrong has been done to the plaintiff.

That being so, the only other question is whether we ought to exercise the power conferred upon us of restraining this exhibition until the trial of the action. That brings me to the second part of the case. The counsel for the defendants most strenuously resisted the suggestion that any imputation whatever was meant to be cast upon the plaintiff by this exhibition of his effigy. It was dis-

tinctly stated that the effigy is exhibited simply as being that of a notorious person; that the exhibition does not insinuate, far less charge, any offence against the plaintiff, and that there was no intention to set up a justification at the trial.

Our attention has been called to some familiar decisions of the Court of Appeal as to the rules which should control the interference of the court in cases of this description. Those authorities relate to the law of libel, and to applications to restrain the publication of a libel until the trial of an action. The court points out, where an application is made to restrain the publication of a libel before the trial of the action, what considerations must be dealt with before it will interfere. It ought not, it is said, as a general rule, to interfere unless it is so certain that any reasonable jury would give a verdict for the plaintiff that the judge would be bound to say that any other verdict was a perverse or unreasonable one. Further, if the defendant intends to set up a justification at the trial, or if the injury done to the plaintiff can be fully compensated for in damages, the court ought not to interfere by an interim injunction to restrain the publication of the libel until the trial of the action. Now, having regard to those principles, is this a case in which we ought to interfere? I have no doubt whatever that any jury ought to find, and would find, that what has been done is an actionable wrong, tending to disparage and injure the plaintiff; and we are, as I have said, relieved from all question of justification at the trial by the express admission of the defendants' counsel. Ought we, then, to abstain from interference on the ground that the wrong done to the plaintiff can be adequately compensated for in damages? In dealing with that question, it must be borne in mind that as between the plaintiff and the defendants, he must be treated as an innocent man. Can it be contended that any payment of money could compensate an innocent man for the injury and misery which would result to him from continuing the exhibition

of his effigy? I think not. In my opinion, irreparable mischief would be done if the defendants were permitted to exhibit this effigy until the trial of the action, and if the public were thus continuously reminded that the suspicion of an atrocious crime had rested upon the plaintiff. I am clearly, therefore, of opinion that in the first case an injunction must go to restrain the defendants from any further exhibition of this effigy.

In the second case, that of Monson *v.* Louis Tussaud, the facts are no doubt somewhat different. The defendant is the proprietor of a small exhibition at Birmingham, of famous and infamous persons, in which also there is a Chamber of Horrors, admission to which entails the payment of an extra fee. The effigy of the plaintiff is not placed in that Chamber of Horrors, but is placed near the turnstile leading to it, where payment is made. Why is it placed there? Is it because he is treated as famous or as infamous — as honorably or discreditably distinguished? The advertisements which were inserted in the newspapers, and which were also carried about by sandwich-men, answer that question. The public are invited to "See the Chamber of Horrors (extra room, 3*d.*), and the instruments of torture — See Vaillant, the Anarchist, and Monson of Ardlamont." That is the company in which the plaintiff's name is placed. It is true that his effigy is not placed with Vaillant in the Chamber of Horrors, but I am unable to draw any satisfactory distinction between the two cases. Mr. Chitty, for the defendant Louis Tussaud, urged us to give separate consideration to each case, and we have done so; but there seems to be no distinction in principle between them. It was suggested during the argument that there was no difference between this case and that of a newspaper which might publish the plaintiff's portrait, and it was asked whether any exhibition of Monson's portrait must be actionable. The answer is No, because a newspaper is entitled in the public interest to refer to, describe, and comment upon any public occurrence, provided that the description

is fair and accurate. The cases are not analogous. But suppose that for the purposes of a newspaper mainly devoted to chronicling criminal cases it was found worth while to shadow a man who had been acquitted of a crime, to take portraits of him and to publish them, stating that they were the portraits of the man who had been tried in such and such a case, would that be actionable? Is it possible to doubt that such a newspaper would be a sharp instrument of torture and an outrage on the man's comfort and peace? That is really analogous to what has been done here.

In this as in the last case, it is admitted that no imputation of any kind upon the plaintiff is intended, and the defendant relies on the same answer, that the notoriety of a person, whether for good or evil, justifies the exhibition of his effigy. The defendant does not seek to justify, and will not attempt to justify, any charge of criminal conduct at the trial. This case, therefore, contains no different factor, and presents no greater difficulty than the other case, and an injunction must go in similar terms.

COLLINS, J. I am of the same opinion, and I need add but very few words to what has been said by Mathew, J. The law is clearly settled that a person may be defamed as well by a picture or effigy as by written or spoken words. This case has to be dealt with by the standard applicable to an action for libel. I do not wish to express any opinion on the question whether a private person can restrain the publication of a portrait or effigy of himself which has been obtained without his authority. That is quite a different question. Applying therefore the standard of a libel action to this application to restrain the exhibition of an effigy of the plaintiff, we have to consider first whether the libel is established, and, secondly, whether it is such as to call for and justify the interference of the court by an interim injunction. When the matter comes to be analyzed, it falls into a very small compass, and we are relieved in the present case from difficulties which often

exist. The counsel for both the defendants have told us that the real question is whether the public exhibition of an effigy of the plaintiff for money amounts to an injurious imputation upon him. They both absolutely disclaim any intention to justify any innuendo or imputation upon the plaintiff, and their case is that no imputation of any kind is intended by such exhibition. Unquestionably there are distinctions in point of fact between the two cases, and perhaps the London case is more clear than the Birmingham one; but the differing facts appear to me to affect only the fringe of the cases, and to leave the principle untouched. We have to consider the object for which the figure is exhibited and the manner in which that object is carried out. The exhibitions are exhibitions for money of the effigies of famous or infamous people, as the catalogue and advertisements show. No effigies of private persons are found there unless such persons have obtained notoriety or fame. Why, then, is the effigy of Monson placed there, and why is public attention invited to it? Is it because he was present at Ardlamont as a casual spectator when through an unfortunate accident Lieutenant Hambrough was shot? Can it be suggested that every person who was present at a grouse drive, for instance, when some member of the party was accidentally shot, would acquire a title to have his effigy placed in these exhibitions? Is the mere presence of the plaintiff at the tragedy a ground for the inclusion of his effigy? It is clear that it is not. The only ground for the exhibition of his effigy must be, therefore, that what happened at Ardlamont was not an accident, but a crime, and that he was in some way or another mixed up with that crime. That can be the only reason for placing his effigy in these exhibitions and advertising it in the manner proved. When the contents and the manner of exhibition of these shows are considered, it is perfectly clear that to place an effigy of the plaintiff in them, and to demand money for showing it, is necessarily to convey a sinister imputation that he was connected with a crime,

and not that he was a spectator of an accident. Under these circumstances it seems to me that the inference which any reasonable jury would draw is inevitable, i. e., that an imputation is made on the plaintiff and that the exhibition of the effigy is a libel upon him. The first condition required by the Court of Appeal is therefore fulfilled. In my opinion, if the jury were to say that there was no libel because no imputation was cast on the plaintiff by the inclusion of his effigy in the defendants' exhibitions, their verdict would be so unreasonable that it ought to be set aside and a new trial granted. But the matter does not stop there, because the Court of Appeal has laid down in the case already cited that, although the libel may be clear, yet, if it is apparent that a justification will be set up at the trial or that the injury is so slight that the plaintiff would recover nominal damages only, the court will not interfere by interim injunction. Any intention to justify any imputation on the plaintiff has been in terms disclaimed, as I have said, and the second condition of the Court of Appeal has been complied with. The only question, therefore, that is left is whether it can be contended that the libel thus unjustified is a mere matter for nominal damages. That has hardly been suggested, and if suggested could certainly not be sustained. It is obvious that, where such an imputation is conveyed by such means and merely to gratify a morbid curiosity, the damages must be substantial. All the conditions laid down by the Court of Appeal have therefore been fulfilled, and the court is consequently justified in interfering. I agree without hesitation that an injunction must go in both cases.

Applications granted.

The defendants in both actions appealed.

In the Court of Appeal further affidavits were filed on both sides in the first-mentioned action, the substance of which was as follows: The affidavits filed by the defend-

ants were to the effect that, shortly after the figure of the plaintiff was first exhibited by the defendants, a person named Tottenham had called on a director of the defendants' company at their offices, and stated that he knew the plaintiff well and came on his behalf, and had entered into an agreement for the sale to the defendants of a suit of shooting-clothes, stated to have been worn by the plaintiff at Ardlamont on the day of the alleged murder, and a gun used by the plaintiff on that day, and that the plaintiff should give them a sitting in order to improve the portrait model of himself for the sum of £100; that Tottenham subsequently handed over the gun and suit of clothes to the defendants and received a check for £50 on account, giving a receipt embodying the terms of the agreement; but that he afterwards wrote returning the check, and stating that the plaintiff refused to confirm the arrangement he had made, and was much annoyed with him for going so far without consulting the plaintiff, and asking for the return of the clothes and gun. It was stated in the defendants' affidavits that information had appeared in the newspapers to the effect that the plaintiff was about to publish a pamphlet on the "Ardlamont Mystery," and that advertisements had been issued of lectures to be delivered by the plaintiff on the subject of the Ardlamont case.

Counter affidavits were filed by the plaintiff. One of these was an affidavit by Tottenham to the effect that the plaintiff had left at his office a portmanteau containing the clothes and gun; that he had, hoping to obtain the sanction of the plaintiff, seeing that the plaintiff was in his debt at the time, offered the clothes and gun to the defendants for £50, on the understanding that if the plaintiff did not acquiesce in what he had done they should be returned and the money repaid; that he had also agreed that the defendants should give him a further £50 if he could induce the plaintiff to give them a sitting; and that he did this entirely on his own responsibility, and without previous communication with the plaintiff; but on informing the plaintiff

what he had done, the plaintiff was indignant and refused to give his consent, and desired him to obtain possession of the clothes and gun. The plaintiff also made an affidavit to the effect that he never gave any authority to Tottenham or any other person to part with the clothes or gun, and was extremely annoyed when informed by him that he had done so, and absolutely refused to give his consent to the transaction; and that no such lectures as advertised had ever taken place, nor did he intend to give such lectures, and, the idea having been once entertained on the impulse of the moment, was immediately and entirely abandoned, and that he never authorized directly or indirectly the insertion of the advertisements of such lectures.

Jan. 23, 24. *Finlay, Q. C.*, and *Gye* (*H. Wace*, with them), for the defendants in the first action. The reasonable inference from the matters stated in the fresh affidavits is, that the plaintiff authorized his friend to make the arrangement which he made with the defendants, though he afterwards changed his mind. The plaintiff's affidavits in answer are not satisfactory. There is matter requiring to be tested by cross-examination of the plaintiff and his witnesses at the trial. Under these circumstances it is apparent that there will be a substantial question for the jury, whether the plaintiff consented in the first instance to the exhibition complained of. That being so, the case is not one in which an interlocutory injunction can be granted according to the rule laid down in Bonnard *v.* Perryman [1891], 2 Ch. 269. It was held in that case that an interlocutory injunction ought only to be granted in an action of libel where the libel was so clear that, if the jury found no libel, the verdict would be set aside as unreasonable. The defendants' case is that the exhibition of this model does not import anything libellous of the plaintiff. It does not import that the plaintiff was guilty or reasonably suspected of murder. The defendants exhibit models of persons in whom the public for

whatever reason take interest. What they have done is simply to exhibit a model of the plaintiff as a person in whom the public was interested as connected with a case which excited great public interest. If what the defendants did amounted to a libel, it would be libellous to publish portraits of persons, tried and acquitted on criminal charges, in an illustrated paper, or photographs of such persons. In any case, it is essentially a question for the jury whether under such circumstances as these the exhibition imports a libel. There is the greatest difficulty and risk of prejudice involved in anticipating the verdict of a jury on a question which since Fox's Act has always been held to be peculiarly one for them. Before the Judicature Act, the Court of Chancery had no jurisdiction to restrain the publication of a libel. Prudential Assurance Co. *v.* Knott, Law Rep. 10 Ch. 142. It has been held since the jurisdiction was given that it is one of a very delicate nature, which ought only to be exercised with the greatest caution and in the clearest possible cases, — that is to say, where a verdict of no libel would be so unreasonable as to be set aside. Coulson *v.* Coulson, 3 Times L. R. 846.

The instances in which courts have interfered by way of injunction in such cases are cases of injury to a trade or business such as there was in Liverpool Household Stores Association *v.* Smith, 37 Ch. D. 170.

Willes Chitty, and *Ernest Pollock*, for the defendant in the second action.

Bernard Coleridge, *Q.C.*, and *Cooper Wylde*, for the plaintiff. The exhibition of the model of the plaintiff under the circumstances clearly amounted to an innuendo disparaging to the plaintiff's character. It either imports that he was guilty or that he was reasonably suspected of murder. The publication of portraits of accused persons in newspapers at the time of a trial is not analogous. The question is whether, after a man has stood his trial and the proceedings are over, the defendants are legally entitled for gain to themselves to pander to a morbid curiosity and

keep the matter from day to day constantly before the public to the injury of the plaintiff's reputation.

The power to grant an injunction in case of libel is derived from s. 25, sub-s. 8, of the Judicature Act, 1873, which says that an injunction may be granted by an interlocutory order of the court in all cases in which it shall appear to the court to be just and reasonable that such order shall be made. There is nothing to confine this power to the case of libels affecting trade or business. In the case of Bonnard *v.* Perryman [1891], 2 Ch. 269, the injunction was refused because the defendant was going to justify the libel. No doubt the Lord Chief Justice, in giving the judgment of the Court of Appeal, adopted the language of Lord Esher, M.R., in Coulson *v.* Coulson, 3 Times L. R. 846, where he said that the jurisdiction ought only to be exercised in the clearest cases, and gave, by way of example, cases where the verdict, if in favor of the defendant, would be set aside as unreasonable. If this was intended to be laid down as a hard-and-fast rule, it would really be importing a limitation into the words of the Judicature Act which is not therein contained. There is no greater difficulty or risk of prejudice in the case of libel than in any other case tried before a jury. It might always be said that an interlocutory injunction would prejudice the trial of the case by the jury. [They cited on this point: Thomas *v.* Williams, 14 Ch. D. 864; Salomons *v.* Knight [1891], 2 Ch. 294; Parmiter *v.* Coupland, 6 M. & W. 105; McDougall *v.* Knight, 17 Q. B. D. 636; Capital and Counties Bank *v.* Henty, 7 App. Cas. 741; Quartz Hill Consolidated Gold Mining Co. *v.* Beall, 20 Ch. D. 501, at p. 508; Beddow *v.* Beddow, 9 Ch. D. 89; Shaw *v.* Earl of Jersey, 4 C. P. D. 120.]

With regard to the fresh affidavits, it is contended that the plaintiff's affidavits satisfactorily negative the suggestion that he ever consented, or that his friend was authorized by him to consent, to this exhibition.

Finlay, Q.C., and *Chitty*, in reply.

Cur. adv. vult.

Jan. 29. Lord Halsbury. Although I believe there is no difference of opinion among us as to the result of this appeal, I am not so certain that the grounds upon which we act are the same, and the questions raised at the bar are of such serious general importance that I feel it necessary to explain distinctly the reasons which operate on my mind in the course to be pursued. If the case were to be argued upon the materials which alone were before the Divisional Court, I should be of opinion that the judgment of the Divisional Court ought to be affirmed. I entirely agree in the reasoning of my brothers Mathew and Henn Collins; but, for a reason I will state presently, I desire to treat separately the question of the summary intervention of the court by way of interlocutory injunction and the question of the character of the exhibition, the continuance of which until the trial it is sought to restrain. What stands at the head of the inquiry is the character of the exhibition itself. Is it libellous or no? — and in expressing my opinion upon it I am not afraid of prejudicing any right by so doing. The jury will have upon the trial of the action to decide the question ultimately, and I have much too high an opinion of the intelligence of juries to suppose that they would be influenced in their judgment if they learned that a judge or a court had thought that the continuance of an exhibition charged as libellous ought to be restrained until the matter came before them for decision. Indeed, it is a little singular to suppose, considering the controversies which used to arise before Mr. Fox's Act, that a jury would on such a question be unduly influenced by the opinion of a judge or a court.

Now this exhibition consists of a portrait model of a person recently tried for murder, the gun with which the murder was said to be perpetrated placed in immediate proximity to the figure, and, in another part of the same establishment, a model or scenic representation of the place where it was alleged the murder took place. If it stopped there, I should have thought that there was enough

to make it a very grave and defamatory exhibition. It seems to be thought that, because it could be said that it was true that the applicant was tried for murder, this is of itself a sufficient answer. It seems to me that this is no answer at all. Because the applicant was tried for murder, and because the circumstances of the trial are commonly known by the reports of proceedings in a court of justice, privileged, be it observed, because they are such reports, this does not justify the unauthorized and unprivileged repetition as a narrative of circumstances of suspicion or of evidence, which certainly were urged by the proper authority as proving that he was guilty of murder. In order to justify a libel, the justification must justify in the sense attributed by the innuendo. It is not the mere words of a written statement being true, or the accuracy of fact in a model or scene represented which will render it justifiable. The circumstances of time or place may raise such inferences as will render either libellous, though the words may be true and the model exact. Lord Blackburn, in giving judgment in the Capital and Counties Bank *v.* Henty, 7 App. Cas. at p. 786, deals with this very question. After expressing his reluctance to express his opinion on cases not before him, he continues: "I think I may safely say that in a time of panic a statement published in a city article of one of our newspapers that such an one had withdrawn his account from such a bank might have a tendency to shake the credit of that bank, and would very probably be understood by such persons as came for information as conveying an imputation upon the credit of that bank." In the same case it was laid down that the test as to whether a writing is a libel or no is whether under the circumstances in which the writing was published, reasonable men would be likely to understand it in a libellous sense.

Now it is urged here that no meaning can be attached to this representation calculated to bring the person whose portrait model is exhibited into hatred, contempt, or ridi-

cule, and that therefore, inasmuch as everybody, or most people, knew that Mr. Monson was tried for murder, it is justifiable to exhibit his portrait as that of the man who was so tried, the weapon with which the murder was alleged to have been committed, and the scene of its commission. That the exhibition amounts to no more than writing, "This is the man who was tried for murder said to be committed by this weapon and in this place." I will assume for the moment that that is a fair representation of what the exhibition means; but I wholly dispute that, if that were the meaning, it would not be libellous. Is it true that you may write with impunity that a person in the course of his career has been tried for some offence? Is it no reflection upon a man's character to say that he has been tried for murder? Will people as readily associate with and accept the companionship of a person of whom such things are said? Let it be observed, I am speaking now of the character of the imputation, and not for the moment dealing with the question whether it could be justified on the ground that it was true. If I understand the argument correctly, it comes to this, — that the exhibition in question is dedicated to the gratification of public curiosity in regard to every person or event which may for the moment be interesting. I confess I regard such a claim with something like dismay. Is it possible to say that everything which has once been known may be reproduced with impunity in print or picture; every incident of a criminal or other trial be produced and its publication justified; not only trials, but every incident which has actually happened in private life, furnish material for the adventurous exhibitor, dramatized peradventure, and justified because, in truth, such an incident did really happen? That it is done for gain does not in itself make it unlawful if it be in other respects legitimate; but it is not altogether immaterial as excluding such a publication from the category of those which are made in the fulfilment of some moral or legal duty. It seems to be assumed that there is no alternative between an innuendo

which shall charge the commission of the murder and the admission that no real imputation is conveyed. I think that is an erroneous view. Suppose the innuendo to be that he was a person of ill-repute. The justification must allege, not that he was tried for murder, but that he was of ill-repute. If it were otherwise, this singular result would follow: That if a man has been convicted and undergone his punishment for crime, the law will protect his reputation (see Leyman *v.* Latimer, 3 Ex. D. 15, 352, and Cuddington *v.* Wilkins, Hob. 67, 81); but if he has been acquitted, his reputation is at the mercy of idle gossip for the rest of his life. I have hitherto said nothing of the associations which, to my mind, are almost necessarily connected with the imputation of crime. I have nothing to do with the intention of the exhibiters. It may well be that the extra 6*d.* charged, because Mr. Monson is for the moment the favorite object of curiosity, may, for aught I know to the contrary, have caused the model to have been placed where it is because it is the most convenient place for charging the extra 6*d.* But what is the impression which would be created on the minds of reasonable men by the juxtaposition of Mr. Monson's model, Mrs. Maybrick's, Scott's, and Pigott's? I think no answer was attempted to be given to Mr. Coleridge's question, Is there any one instance of a victim of an accident or an innocent man being exhibited in this part of the establishment? It is, indeed, suggested that a recumbent figure of the Emperor Napoleon is in the same room; but the answer seems to me to be wholly insufficient. If Mr. Monson were a public character, with respect to whom it might be said that his public life or his great position is calculated to create an interest, the answer might be plausible; but who knows, or ever did know, anything about Mr. Monson except his connection with the alleged murder at Ardlamont? And why, then, is he placed near a convicted prisoner, one fugitive from justice not yet captured, and another who escaped justice by suicide? If one adds to that, that the

scene of the alleged murder is also represented, and admission gained to it by the same fee, and in the place wherein are stored the effigies of many convicted criminals and some scenes of crime, it is a bold assertion to maintain that to the ordinary mind such an association of circumstances suggests no imputation of guilt.

But I have now to deal with the question of the summary interposition of the court restraining the continuance of this exhibition until the trial of the action. Two points arise upon it. In the first place, it is said that the court ought not to pronounce anything to be a libel when that very question must afterwards be submitted to the judgment of a jury; and secondly, that the question has already been concluded by authority in this court. Sitting here, I quite admit that I am bound by a former decision of this court. With respect to the first point, my answer is that the legislature in 1873 and 1875 gave the power by the unqualified language of its enactment to do the very thing in question wherever the court should deem it just and convenient. Had it thought right to limit the exercise of such power to cases where no question should be afterwards determined by a jury, it might have limited the exercise of such a power to such cases. It cannot be assumed to be ignorant of the state of the law or the practice, and it has enacted in the widest terms the jurisdiction in question. It is not necessary to enumerate, but there are other examples of jurisdictions where judges must exercise, in the first instance, a judgment which must, nevertheless, afterwards be submitted to a jury.

The second objection is one with which I have more delicacy in dealing. As I have already said, I am bound by a former decision of this court, but it is the decision of the court — what in fact the court did decide — that is the authority to which I must submit. I have some difficulty in following the argument that a decision of the court on one set of facts is an authority upon another and a totally different set of facts. Of course, if the two sets of facts are

governed by some principle of law, the principle of law affirmed by the court is equally authoritative to whatever facts the principle may be applied; but where the strength and cogency of the facts themselves, or the inference derived therefrom, is in debate, I cannot, as a matter of reasoning, compare one set of facts with another and bring them within any governing principle. Nor am I helped by a conjecture as to what a jury would do in a supposed case and what a court of review would then do if the jury did it. In the case of Bonnard *v.* Perryman [1891], 2 Ch. 269, affirming the former authority before the Master of the Rolls, it was laid down, and I cheerfully accept the proposition that the court ought not to interfere by interlocutory injunction unless it was "a clear case." Different forms of expression are used by different judges to indicate the degree of clearness which ought to be brought home to the mind of a judge before he exercises the power now in question. But it is a canon of construction too familiar to render more than an allusion to it necessary, that expressions however general and phrases however wide are cut down and qualified by the subject-matter with respect to which they are uttered. If I were to understand the test suggested to be applicable to all cases, so that it practically excluded actions of libel from the operation of the Judicature Acts with respect to granting interlocutory injunctions, it would be to overrule the legislature, — a power which is not possessed either by this or any other court. But, as I have said, I do not so understand the decisions relied upon. The last one speaks of the procedure in question as being only just and convenient in exceptional cases, — that is, exceptionally clear cases. Something was said as to the procedure being only applicable to trade libels. I think the suggestion is quite unfounded. The Court of Chancery had no jurisdiction in libel cases; but they had jurisdiction to issue injunctions to restrain injuries to trade; and efforts were occasionally made to treat libels as injuries to trade, so as to bring them within the jurisdiction which the court

of Chancery was empowered lawfully to exercise; but whatever may have been the interest of such discussions, the Judicature Acts have rendered all of them idle. In all cases where the court shall think it just and convenient, the remedy exists. I should have thought the protection of a man's character much more important than the protection of his trade. See Hermann Loog *v.* Bean, 26 Ch. D. 306. I do not deny that it is a difficult task for any court to determine when the case is so clear that the remedy ought to be applied. In this case it is for the jury, and always would have been for the jury, to determine the question, libel or no libel; since in the unanimous opinion of the judges given to the House of Lords in 1792 (see 22 How. State Trials, 298), while adhering to Lord Mansfield's opinion as to the construction of a written document (see Woodfall's Case, 20 How. State Trials, 895, and 5 Burr. 2661), they frankly admitted that wherever the sense of a paper was to be collected from matter *dehors* the paper, the matter was for the jury; and it need hardly be stated here that "libel or no libel" in this case must be absolutely for the jury. A rule, however, which should place the question of libel or no libel absolutely in the hands of the court so as to control the operation of an Act of Parliament would go far to revive a controversy which has now been laid to rest for upwards of a century (see Baron Parke's observations in Parmiter *v.* Coupland, 6 M. & W. 105); and for this among other reasons I cannot think that the decisions referred to are to be understood in the sense contended for. In the view, therefore, that I take of the facts, I should have thought this was a clear case of libel, and an equally clear case for the prompt interference of the court to restrain it until the trial of the action.

The question, however, remains whether the new evidence adduced, and which was not before the Divisional Court at all, alters that view; and I am of opinion that it does. Of course, if the exhibition in question is made with the consent, expressed or implied, of the applicant for the

injunction, there is no ground for the application. Now, the facts may be very shortly stated. The confidential friend of the applicant entered into a written bargain with the proprietors of this exhibition (Madame Tussaud's) to supply them with the clothing and the gun which Mr. Monson was using at the time of Lieutenant Hambrough's death, and an agreement to give a sitting by Mr. Monson, to aid the portrait modeller. If this was done with Mr. Monson's authority, there is, of course, an end of the question. Now, in discussing this matter, I am anxious not to prejudice any inquiry which may hereafter be held into these matters. It is enough to say that upon the correspondence and the affidavits of Mr. Monson and Mr. Tottenham it is very doubtful indeed to my mind how a jury would find, or what further investigation might disclose. And I think that in this state of the evidence, the views expressed in the two cases referred to above (see Bonnard *v.* Perryman [1891], 2 Ch. 269; Coulson *v.* Coulson, 3 Times L. R. 846), are binding upon me, and I think, therefore, that this injunction must be dissolved. For reasons already given, the same course will be followed in the Birmingham case; since, if such an exhibition was permitted by the plaintiff in London, the court would not restrain it by interlocutory injunction in Birmingham.

Lopes, L. J. These are two appeals from orders of the Divisional Court granting interlocutory injunctions to restrain the defendants from respectively exhibiting or advertising the exhibition of a wax model representing the plaintiff.

The facts of the Ardlamont case are too well known to require recapitulation; suffice it for the purposes of this appeal to say that the plaintiff was tried in the Ardlamont case at Edinburgh before the Lord Justice Clerk and a jury, and the jury found a verdict of "Not proven."

Shortly after the trial the defendants respectively exhibited wax models representing the plaintiff at their respective establishments. I propose to deal only with

the facts in the first case. The facts in the second are practically the same, and the second case must follow the decision in the first.

The ground of the application for an interlocutory injunction was that the exhibition of which the plaintiff complains was calculated to disgrace him and to expose him to public obloquy and contempt, and was, therefore, a libel upon him.

The facts with regard to the exhibition of the wax model so far as material are as follows: The figure of the plaintiff was in a room called "Napoleon Room, No. 2," within a turnstile where an extra 6*d.* was demanded. In this room there were five figures: a large recumbent figure of the Emperor Napoleon, a figure of Mrs. Maybrick, another of Pigott, another of Scott, and one of the plaintiff, with their respective names. There were other objects of interest in the same room, — for instance, relics of the Emperor Napoleon and the Duke of Wellington. From the room you could descend a staircase, and then find yourself in what is called "The Chamber of Horrors," where there was a representation of what is called "The Scene of the Ardlamont Mystery."

Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures, may constitute a libel. The plaintiff's case, therefore, is libel, and this application for an interlocutory injunction must be determined upon the principles which are applicable to the granting of injunctions in cases of libel. It must be borne in mind that the question is not whether what is done is libellous, but whether a case for an interlocutory injunction is made out. Prior to the Common Law Procedure Act, 1854, no court could grant any injunction in a case of libel. The Court of Chancery could grant no injunction in such a case, because it could not try a libel. Neither could courts of common law, until the Common

Law Procedure Act of 1854, because they had no power to grant injunctions. Whether they had power to grant an interlocutory injunction after 1854, I think doubtful. As a matter of practice, they never did. The first instance of exercising the power of granting an injunction in libel was Saxby *v.* Easterbrook in 1878, 3 C. P. D. 339, and that after trial. The Judicature Act of 1873, s. 25, sub-s. 8, confers a larger jurisdiction to grant injunctions than existed before. It says, "A *mandamus* or an injunction may be granted, or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made." It is upon this section that the plaintiff rests his case. It is not necessary to consider cases that occurred before the coming into operation of the Judicature Acts. Coulson *v.* Coulson, 3 Times L. R. 846, was decided in 1887, and contains a judgment of the present Master of the Rolls which underlies every subsequent decision on the subject. It is reported in the Times Law Reports for 1887, and at p. 846 the Master of the Rolls (Lord Esher) says that "it could not be denied that the court had jurisdiction to grant an interim injunction before trial. It was, however, a most delicate jurisdiction to exercise, because, though Fox's Act only applied to indictments and informations for libel, the practice under that act had been followed in civil actions for libel, that the question of libel or no libel was for the jury. It was for the jury and not for the court to construe the document and to say whether it was a libel or not. To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be

satisfied that in all probability the alleged libel was untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It followed from those three rules that the court could only on the rarest occasions exercise the jurisdiction." In the same year the case of Liverpool Household Stores Association *v.* Smith, 37 Ch. D. 170, came before the late Cotton, L. J., and myself in this court, and Coulson *v.* Coulson, 3 Times L. R. 846, was followed and approved. The matter of restraining libels on interlocutory motions for injunction was thought of such importance that the question was, in Bonnard *v.* Perryman [1891], 2 Ch. 269, argued before the full Court of Appeal, and Lord Coleridge, in delivering the considered judgment of the court, said: "We entirely approve of, and desire to adopt as our view, the language of Lord Esher in Coulson *v.* Coulson, *supra*. To justify the court in granting an injunction it must come to a decision upon the question of libel or no libel before the jury have decided whether it was a libel or not. Therefore the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable." I cannot help thinking that a principle was laid down in this case applicable to all libels without limitation. Comment has been made on the words "in the clearest cases," and it has been asked what those words mean. I think the criticism would be well founded, and they might be complained of as indefinite, if they had not been in my judgment explained in the most exhaustive way by what follows, viz., "where any jury would say the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable." This is the rule by which we are bound, and I ask myself, if the jury found a verdict for the defendants in this case, would the court set it aside as unreasonable?

I propose first to deal with the case as it came before the Divisional Court, and, secondly, as it has come before this court with the additional evidence. I do not think that the Divisional Court were justified in coming to the conclusion that the libel was so clear that if a verdict passed for the defendants it must be set aside as unreasonable. Mr. Coleridge, for the plaintiff, contended that the exhibition, under the circumstances, of the plaintiff's figure necessarily involved the imputation that he was concerned criminally in the death of Lieutenant Hambrough. Mr. Finlay, for the defendants, contended that the defendants imputed nothing disgraceful or injurious to the character of Monson, and that all that the exhibition meant was, "Here is the likeness of Monson, who was tried in the Ardlamont case, and was not convicted. Here is the likeness of a person who has recently excited much public attention in connection with a trial, the circumstances of which every one knows." Is not the inference to be drawn from what was done a proper question for the jury? Suppose a jury came to the conclusion that what was done imputed nothing disgraceful or injurious to the character of Monson, that he had become, owing to the notoriety of the Ardlamont case, a subject of public interest, and the defendants exhibited his likeness as likely to bring persons to their exhibition, adding nothing to what was known of him before, and not even associating him with the Ardlamont case, except so far as the scene of the "Ardlamont Mystery" was in the room below and the figure in the room above. Would a court say that such a conclusion was so unreasonable that it ought not to be permitted to stand? Might not a jury without being unreasonable consider that any discredit attaching to Monson resulted from the trial, and was not affected by the exhibition of his figure at Madame Tussaud's? Might they not think, without being unreasonable, that the action was brought more in aid of his purse than his personal character? Put aside the surroundings, and what is there more in this wax figure than

the publishing Monson's likeness in a newspaper, with his name under it, or the display of his likeness in a shop window? Grotesque pictures of individuals may, I doubt not, be in certain circumstances actionable if any one thought fit to notice them; but I should think it would require an uncommonly strong case to make them the subject of an interlocutory injunction. But it is said, Look at the surroundings — Mrs. Maybrick, Pigott, and Scott (another celebrity in the Ardlamont case), and the Chamber of Horrors below. No doubt all this is important, and essentially for a jury. Mr. Coleridge did not, so far as I recollect, attach much importance to the companionship, for, in answer to me, he said that if Monson's figure had been placed between royal personages, it would be the same. I am unable to agree with the decision of the Divisional Court, and think this case is not brought within the rule laid down in Bonnard *v.* Perryman [1891], 2 Ch. 269.

But, except for future cases that may occur, I should not have thought it necessary to express disagreement with the decision of the court below, because there is new evidence brought before us which makes it impossible to allow the injunction to issue. As the case will have to be tried, I propose to say little about this evidence. Suffice it to say, that there is such a conflict of evidence with regard to Monson's conduct, one side saying he consented to the exhibition of his figure, and the other in a not very satisfactory way denying any consent, as to render it imperative that the facts should be investigated by a jury before any injunction is granted. It is passing strange that a man who now asserts his anxiety to bury in oblivion the circumstances of the Ardlamont case should be found writing a pamphlet on that case, and, as he says, "on the impulse of the moment," announcing himself as a public lecturer on the same subject!

Libel or no libel has, since Fox's Act, whether in civil or criminal cases, been always regarded as essentially a question for the jury. I was much impressed by an observation

of Davey, L. J., during the argument, when he said that at the Chancery Bar he had always contemplated libel with awe. I, as a member of the Common-Law Bar, have always had the same feeling. Criticism is easier than composition, and speaking for myself I should deeply regret that by any subtle distinction or ingenious criticism the authority of the case of Bonnard *v.* Perryman [1891], 2 Ch. 269, decided by the full Court of Appeal, should be impaired or "whittled" away, and thus some additional fetter be imposed on liberty of speech, and the functions of a jury, in my judgment, unauthorized by that decision. The appeals, therefore, must be allowed.

DAVEY, L. J. In Coulson *v.* Coulson, 3 Times L. R. 846, the Master of the Rolls is reported to have used the following words: "To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable." I understand the Master of the Rolls to have intended the expressions that follow the words "clearest cases" as an explanation or expansion of what he meant by those words. The Master of the Rolls was so understood by Cotton, L. J., in Liverpool Household Stores Association *v.* Smith, 37 Ch. D. 170; and in Bonnard *v.* Perryman [1891], 2 Ch. 269, the Lord Chief Justice, in delivering the judgment of the full Court of Appeal, approved of and adopted the language of the Master of the Rolls. I understand the court in that case to have judicially laid down for themselves a rule of practice, which is binding upon me, with regard to the circumstances under which the court ought to grant an interlocutory injunction pending the trial in cases of libel; or, in other words, to have defined the conditions, subject to which it is "just and convenient" to grant an injunction

in such cases. In Collard *v.* Marshall [1892], 1 Ch. 571, Chitty, J., granted an interlocutory injunction in a case which appeared to him to satisfy those conditions; and it is to be observed that in that case the defendant was willing to treat the motion as the trial of the action, and therefore did not require the case to be submitted to a jury. I am of opinion that the principles laid down in the cases referred to are applicable to the present case; and the question, therefore, which the court has to answer is whether the affidavits which have been read and commented on before us disclose a case on which the jury at the trial of the action could properly find only a verdict for the plaintiff. I should have much hesitation in differing from the opinion of two judges of so much experience if the case came before us only on the same affidavits as were used in the court below. But affidavits have been used before us which raise a question of acquiescence and active consent against the plaintiff, and indeed suggest that he sold the right to exhibit his effigy with his own clothes and gun, though he afterwards changed his mind. Of course, these affidavits fall far short of proving such a case against the plaintiff, but they certainly suggest it in a manner and with circumstances which show that there is a case for consideration by a jury, and one on which I decline to speculate or express any opinion what their verdict ought to be when they have complete evidence by examination and cross-examination of the witnesses before them. I may observe that in Bonnard *v.* Perryman [1891], 2 Ch. 269, though the libellous character of the publication was, in the language of the Lord Chief Justice, beyond dispute, the court refused to grant an injunction on a mere suggestion by affidavit, without any particulars, of a case of justification. I ought to add that I see no logical distinction for this purpose between a case of libel affecting trade or property, and one affecting character only. In basing my judgment on the ground which I have stated, I must not be taken to say whether I should or should not have agreed

with the learned judges in the views expressed by them on the materials before them. Whether the exhibition of Mr. Monson's effigy under the circumstances in the place and with the surroundings mentioned in the affidavits suggests such innuendo as may be alleged in the pleadings is a question which will have to be decided by the jury on the trial of the action. This will dispose of the case against Madame Tussaud, Limited.

With regard to the case against Louis Tussaud, no case of consent has been brought before us on the affidavits in such a way as would oblige the court to pay attention to it. But having the affidavits in the other case before us, it would be idle for the court to pretend to shut its eyes to or ignore the fact that such a case will be open to the defendant in that action also at the trial. I think, therefore, without expressing any opinion on the merits of the case, or on the opinions expressed in the court below, it is not a case in which it is proper to grant an interlocutory injunction.

Appeals allowed.[1]

Solicitors for plaintiff: *Brown & Co.*, for *J. W. Phillips*, Birmingham.

Solicitors for defendants, Tussauds, Limited: *E. F. & H. Landon.*

Solicitors for defendant, Louis Tussaud: *Blachford, Riches & Co.*

[1] Compare Hughes *v.* McDonough, 43 N. J. L. 459 (1881); Schuyler *v.* Curtis, 27 Abbott's New Cases, 387 (1891), s. c. 15 N. Y. Supp. 787.

And see S. D. Warren and L. D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890); and the reporter's note in 27 Abbott's New Cases, 379.

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